

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

OCTOBER TERM, 1913.

No. 2587.

55

MARY A. SULLIVAN, APPELLANT,

vs.

THOMAS J. KILLIGAN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED AUGUST 15, 1913.

PRINTED SEPTEMBER 13, 1913.

Sec. 10,
Ch. J.

Court of Appeals of the District of Columbia.

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INDEX.

	Original. Print	
Caption	a	1
Bill	1	1
Disclaimer	10	6
Answer of Mary A. Sullivan.....	11	6
Joinder of issue.....	19	10
Order on the question of admission of certain testimony.....	19	10
Decree	20	11
Order for appeal.....	23	12
Citation	24	12
Notice for order to fix penalty of bond.....	25	13
Order fixing penalty of bond.....	26	14
Memorandum: Appeal bond approved and filed.....	27	14
Assignments of error	27	14
Extension of time.....	29	15
Additional assignments of error.	29	15
Order showing submission of proposed statement of evidence	30	16
Designation for transcript of record.....	31	16
Memorandum: Digest of testimony on appeal signed	33	17
Clerk's certificate.....	34	17

	Original.	Print
Statement of evidence..	35	<u>17</u>
Testimony of T. J. Killigan..	35	18
Katherine Killigan..	51	<u>27</u>
Josephine Killigan..	53	28
Lawrence Hufty..	54	29
E. J. Sullivan	57	31
Mary A. Sullivan	64	34
J. B. Archer..	81	44
John Lewis Smith	85	46
F. O. Roman..	85	47
Selina Brown..	88	48
Thos. F. Sweeney.	91	50
Alice L. Gulli..	93	51
J. B. Archer (recalled)..	94	52
A. G. Buhrman..	100	55
C. F. Umhau...	100	55
Margaret A. Ruppert..	101	56
T. J. Killigan (recalled)..	103	<u>58</u>
Mary A. Sullivan	105	59
Deed..	106	60
Will of T. J. Killigan..	107	61
Certificate of Justice Barnard..	109	62

In the Court of Appeals of the District of Columbia.

No. 2587.

MARY A. SULLIVAN
vs.
THOMAS J. KILLIGAN.

a Supreme Court of the District of Columbia.

Equity. No. 31253.

THOMAS J. KILLIGAN, Plaintiff,
vs.
MARY A. SULLIVAN and JAMES SULLIVAN, Her Husband,
Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Bill.*

Filed August 31, 1912.

In the Supreme Court of the District of Columbia.

Equity. No. 31253.

THOMAS J. KILLIGAN, Plaintiff,
vs.
MARY A. SULLIVAN and JAMES SULLIVAN, Her Husband, Defendants.

To the Supreme Court of the District of Columbia, holding an Equity Court for said District:

The plaintiff states as follows:

1. That he is a citizen of the United States and a resident of the District of Columbia, and brings this suit in his own right.
2. The defendants are both citizens of the United States and residents of the District of Columbia, and are sued as hereinafter set forth.

3. Heretofore, to-wit, on the 30th day of March, 1909, and prior thereto, the plaintiff was seized and possessed in fee simple of sub-lot Seventeen (17), and lot G, in Square Four hundred and Forty-two (442), in the City of Washington, District of Columbia, subject, however, as to said lot 17 to a deed of trust for Sixteen hundred (\$1,600.00) Dollars, recorded in Liber 3215, folio 243, of the
2 Land Records of the District of Columbia, which said lots were and now are improved by a substantial brick building used and occupied by the plaintiff as his residence and home, and the store part thereof having been formerly used by plaintiff for his tinning and heating business; said building being known as premises Numbered 1713 Seventh Street, Northwest, the market value of which was then and now is about Fourteen thousand (\$14,000.) Dollars.

4. That some time prior to the said 30th day March, 1909, the said defendant, Mary A. Sullivan, whose name at that time was Mary A. Stahl, she being then the wife of John Stahl, now deceased, urged and importuned the plaintiff to convey the hereinbefore described lots and premises to her, to be held by her as trustee for the plaintiff and for no other purposes, suggesting and saying, among other things, to the plaintiff, as a reason for so doing, the habits of intoxication of the plaintiff, which habits rendered the plaintiff at odd times and periods of time from properly attending to his business affairs, as well as the impairment, in mind and body, of the plaintiff, and stating that if he would so convey the said described lots and premises unto her, in trust for him, that she would manage, control and collect the rents and profits thereof and account unto him therefor. That these suggestions and requests were made by the said defendant to the plaintiff on several occasions prior to the said 30th day of March, 1909, but the plaintiff is unable to
3 give the exact dates when the said requests were made, but as near as he can now fix the dates they were made on or about, between the latter part of February, 1909, and the 30th day of March, 1909, but the requests were made by said defendant, Mary A. Sullivan on other occasions to the plaintiff and he was urged by her to so convey the said property in trust to the defendant, Mary A. Sullivan (formerly Mary A. Stahl). At the time and times that such requests and importunities to convey said property in trust, as aforesaid, were made to the plaintiff by said defendant, Mary A. Sullivan (formerly Mary A. Stahl) and for a long time prior thereto, the plaintiff had been addicted to the use of intoxicating liquors, which use was beyond his control and was to such an extent that such use had not only disqualified him from attending at certain times and intervals to his business affairs, but the excessive use of said intoxicating liquors had been such as to affect the plaintiff's mind and impair and weaken his intellect, and he had for this reason been required to retire from and wind up his said tinning and heating business, and this the said defendant, Mary A. Sullivan (formerly Mary A. Stahl), well knew. The said defendant, Mary A. Sullivan (formerly Mary A. Stahl) further suggested to the plaintiff as a reason for his so conveying the property to her, that she was a niece of the plaintiff's former wife and that he, the plaintiff, should by rea-

son thereof have entire confidence in her. The plaintiff had never agreed to comply with the requests and suggestions and importunities of the said defendant, Mary A. Sullivan (formerly Mary A. Stahl),

4 but the same had impressed the plaintiff. But notwithstanding the fact that the plaintiff had not consented so to do, the said defendant, Mary A. Sullivan (formerly Mary A. Stahl) without the plaintiff's consent, knowledge or direction, procured to be drawn up a form of deed in fee simple of said lots and premises from the said plaintiff to the said defendant, Mary A. Sullivan, whose name at that time, to wit, on March 30th, 1909, was Mary A. Stahl; and the form of deed so procured by the defendant, Mary A. Sullivan, was from the plaintiff to her, under the name and style of Mary A. Stahl. That in the forenoon of the said 30th day of March, 1909, the said defendant, Mary A. Sullivan (formerly Mary A. Stahl) falsely represented to the plaintiff that she had arranged to have a deed in trust drawn up for the conveying of the said herein before described lots by him to her, embodying the trusts hereinbefore mentioned, and the plaintiff relying on the false representations made by the said defendant, Mary A. Sullivan (formerly Mary A. Stahl), did not read the said form of deed, but at the request, solicitation and importunity of the said defendant, Mary A. Sullivan (formerly Mary A. Stahl), on the said 30th day of March, 1909, he, the said plaintiff, later the same day, when the said form of deed was for the first time presented to him at his said house by a person he did not know, signed the said deed, believing the same to be a deed in trust as represented by her, and the said person who presented the said deed to him, took it away with him, and the said defendant, Mary A. Sullivan (formerly Mary A. Stahl), caused the
5 same to be thereafter recorded in Liber 3228, folio 11, one of the Land Records of the District of Columbia. Plaintiff further alleges that on the said 30th day of March, 1909, the plaintiff was so impaired in body and mind that he was not capable of making a valid deed or contract, and was incapable in law of executing said deed, and the said defendant well knew the plaintiff's infirmity and mental weakness and thereby unduly influenced him in signing said deed, well knowing that the plaintiff had not taken any independent advice in the matter.

5. That no adequate consideration whatever passed from the said Mary A. Sullivan (formerly Mary A. Stahl) to the plaintiff for executing said deed and conveying said lots and premises by absolute fee simple title, but the consideration, if any, was grossly inadequate. That the plaintiff was then living in said premises as his home, and the said defendant, Mary A. Sullivan (formerly Mary A. Stahl), together with her then husband, John Stahl, was living with the plaintiff, and the plaintiff has continued to live in said premises as his home, except that shortly before the bringing of this suit the conditions and relations existing between the plaintiff and the defendants became unbearable to the plaintiff, and he was compelled thereby to temporarily go elsewhere, but the plaintiff still retains his same accustomed room and living quarters in said premises. That subsequent to the signing of said alleged deed (although he has

3. Heretofore, to-wit, on the 30th day of March, 1909, and prior thereto, the plaintiff was seized and possessed in fee simple of sub-lot Seventeen (17), and lot G, in Square Four hundred and Forty-two (442), in the City of Washington, District of Columbia, subject, however, as to said lot 17 to a deed of trust for Sixteen hundred (\$1,600.00) Dollars, recorded in Liber 3215, folio 243, of the
2 Land Records of the District of Columbia, which said lots were and now are improved by a substantial brick building used and occupied by the plaintiff as his residence and home, and the store part thereof having been formerly used by plaintiff for his tinning and heating business; said building being known as premises Numbered 1713 Seventh Street, Northwest, the market value of which was then and now is about Fourteen thousand (\$14,000.) Dollars.

4. That some time prior to the said 30th day March, 1909, the said defendant, Mary A. Sullivan, whose name at that time was Mary A. Stahl, she being then the wife of John Stahl, now deceased, urged and importuned the plaintiff to convey the hereinbefore described lots and premises to her, to be held by her as trustee for the plaintiff and for no other purposes, suggesting and saying, among other things, to the plaintiff, as a reason for so doing, the habits of intoxication of the plaintiff, which habits rendered the plaintiff at odd times and periods of time from properly attending to his business affairs, as well as the impairment, in mind and body, of the plaintiff, and stating that if he would so convey the said described lots and premises unto her, in trust for him, that she would manage, control and collect the rents and profits thereof and account unto him therefor. That these suggestions and requests were made by the said defendant to the plaintiff on several occasions prior to the said 30th day of March, 1909, but the plaintiff is unable to
3 give the exact dates when the said requests were made, but as near as he can now fix the dates they were made on or about, between the latter part of February, 1909, and the 30th day of March, 1909, but the requests were made by said defendant, Mary A. Sullivan on other occasions to the plaintiff and he was urged by her to so convey the said property in trust to the defendant, Mary A. Sullivan (formerly Mary A. Stahl). At the time and times that such requests and importunities to convey said property in trust, as aforesaid, were made to the plaintiff by said defendant, Mary A. Sullivan (formerly Mary A. Stahl) and for a long time prior thereto, the plaintiff had been addicted to the use of intoxicating liquors, which use was beyond his control and was to such an extent that such use had not only disqualified him from attending at certain times and intervals to his business affairs, but the excessive use of said intoxicating liquors had been such as to affect the plaintiff's mind and impair and weaken his intellect, and he had for this reason been required to retire from and wind up his said tinning and heating business, and this the said defendant, Mary A. Sullivan (formerly Mary A. Stahl), well knew. The said defendant, Mary A. Sullivan (formerly Mary A. Stahl) further suggested to the plaintiff as a reason for his so conveying the property to her, that she was a niece of the plaintiff's former wife and that he, the plaintiff, should by rea-

son thereof have entire confidence in her. The plaintiff had never agreed to comply with the requests and suggestions and importunities of the said defendant, Mary A. Sullivan (formerly Mary A. Stahl),

4 but the same had impressed the plaintiff. But notwithstanding the fact that the plaintiff had not consented so to do, the said defendant, Mary A. Sullivan (formerly Mary A. Stahl) without the plaintiff's consent, knowledge or direction, procured to be drawn up a form of deed in fee simple of said lots and premises from the said plaintiff to the said defendant, Mary A. Sullivan, whose name at that time, to wit, on March 30th, 1909, was Mary A. Stahl; and the form of deed so procured by the defendant, Mary A. Sullivan, was from the plaintiff to her, under the name and style of Mary A. Stahl. That in the forenoon of the said 30th day of March, 1909, the said defendant, Mary A. Sullivan (formerly Mary A. Stahl) falsely represented to the plaintiff that she had arranged to have a deed in trust drawn up for the conveying of the said herein before described lots by him to her, embodying the trusts hereinbefore mentioned, and the plaintiff relying on the false representations made by the said defendant, Mary A. Sullivan (formerly Mary A. Stahl), did not read the said form of deed, but at the request, solicitation and importunity of the said defendant, Mary A. Sullivan (formerly Mary A. Stahl), on the said 30th day of March, 1909, he, the said plaintiff, later the same day, when the said form of deed was for the first time presented to him at his said house by a person he did not know, signed the said deed, believing the same to be a deed in trust as represented by her, and the said person who presented the said deed to him, took it away with him, and the said defendant, Mary A. Sullivan (formerly Mary A. Stahl), caused the
5 same to be thereafter recorded in Liber 3228, folio 11, one of the Land Records of the District of Columbia. Plaintiff further alleges that on the said 30th day of March, 1909, the plaintiff was so impaired in body and mind that he was not capable of making a valid deed or contract, and was incapable in law of executing said deed, and the said defendant well knew the plaintiff's infirmity and mental weakness and thereby unduly influenced him in signing said deed, well knowing that the plaintiff had not taken any independent advice in the matter.

5. That no adequate consideration whatever passed from the said Mary A. Sullivan (formerly Mary A. Stahl) to the plaintiff for executing said deed and conveying said lots and premises by absolute fee simple title, but the consideration, if any, was grossly inadequate. That the plaintiff was then living in said premises as his home, and the said defendant, Mary A. Sullivan (formerly Mary A. Stahl), together with her then husband, John Stahl, was living with the plaintiff, and the plaintiff has continued to live in said premises as his home, except that shortly before the bringing of this suit the conditions and relations existing between the plaintiff and the defendants became unbearable to the plaintiff, and he was compelled thereby to temporarily go elsewhere, but the plaintiff still retains his same accustomed room and living quarters in said premises. That subsequent to the signing of said alleged deed (although he has

never seen it since it was signed by him, the party who brought it to him having taken it away with him), the plaintiff, in a conversation with the defendant, Mary A. Sullivan (at that time Mary A. Stahl), learned that the same was in form a deed in fee simple of said property and that it was not in accordance with her previous representations to him, and he then demanded from her that she reconvey the said property to the plaintiff or execute a declaration of trust or some paper showing to the plaintiff that it was held by her in trust solely for the plaintiff; but the said defendant, Mary A. Sullivan (formerly Mary A. Stahl) at that time further represented to, and assured, the plaintiff, that while the said deed was in fact a deed in fee simple, she recognized that no adequate consideration whatever had been given by her to the said plaintiff for said deed and for conveyance of said lots and premises to her in fee simple, and that she was then holding and would continue to hold the said property in trust solely for the plaintiff, upon the trusts as hereinbefore mentioned, and would, at any time thereafter, at his request, execute a deed reconveying the said property to the plaintiff or do with it as he might direct her whenever the plaintiff demanded the same; and further represented to the plaintiff, that while she would hold the said lots and premises only on trust for him and for his sole benefit, and convey it as he might direct, yet it was better and for his interests, that the same be held in her name on the record. The plaintiff relied upon the said promises and representations of the said defendant, Mary A. Sullivan (formerly Mary A. Stahl), having confidence in her; but on or about, to-wit, the first day of June, 1912, the plaintiff realizing that the defendant, Mary A. Sullivan (formerly Mary A. Stahl) was not carrying out her promises and agreements with regard to managing, controlling and collecting the rents and profits of said lots and premises for plaintiff's benefit, made a demand on the said defendant, Mary A. Sullivan (formerly Mary A. Stahl), that the said lots and premises be reconveyed by her to the said plaintiff in fee simple as she had previously promised to do on the demand of the plaintiff, but the defendant, Mary A. Sullivan (formerly Mary A. Stahl), then, for the first time, refused to so convey said property to the plaintiff, as she had promised and agreed to do.

6. Subsequent to the conversation had by the plaintiff with the defendant, Mary A. Sullivan, mentioned in the 5th paragraph of this bill of complaint, in which she represented to and promised the plaintiff that she was holding and would hold said property solely for his benefit, and convey it only as he might direct her, the said defendant, Mary A. Sullivan (at that time Mary A. Stahl), with the consent and at the direction of the plaintiff, conveyed the said lot Seventeen (17) to Henry H. Bergman and J. A. Maedel, as trustees, to secure to the German American Fire Insurance Company the sum of Eighteen hundred dollars (\$1,800.00), and out of said \$1,800.00 secured by said deed of trust last mentioned, there was paid the amount of the said deed of trust (\$1,600.00) and accumulated interest thereon, mentioned in the 3rd paragraph of this bill of complaint, and the costs and expenses of releasing said former

deed of trust (for \$1,600.00), and of drawing and executing said deed of trust to said Bergman and Maedel, as trustees, and
8 searching the title of said property. And the only encumbrance now on said property is the said \$1,800.00, secured by the said deed of trust to said Henry H. Bergman and J. A. Maedel, Trustees, which is recorded in Liber No. 3387, folio 183, one of the Land Records of the District of Columbia; and this last mentioned deed of trust to said Bergman and Maedel, Trustees, the plaintiff has ratified and confirmed and does now ratify and affirm as a valid and existing trust on the property it purports to convey as security aforesaid.

7, The defendant, James Sullivan, the present husband of the defendant, Mary A. Sullivan, has no title or interest in said lots and premises, but out of an abundance of caution he is made a party hereto, for the reason that if said alleged deed from plaintiff to his (the said defendant, James Sullivan's) wife had been or was valid, and was not set aside or declared void by this honorable court, he might have at some future time a tenancy by the courtesy in said lots, in case of the death of his wife intestate and with issue by him.

8. That without the intervention of this Honorable Court of Equity, the plaintiff is without relief against the said defendants.

Prayers.

The premises considered, the plaintiff prays:

I. That writs of subpœnas may issue against the defendants, Mary A. Sullivan and James Sullivan, commanding them and each of them to appear and answer this suit.

9 II. That a decree may be passed by this Honorable Court declaring said alleged deed from the plaintiff to the said defendant, Mary A. Sullivan, void and of no effect, and setting the same aside, and declaring the title of said lots and premises to be in the plaintiff, subject only to the said deed of trust to Henry H. Bergman and J. A. Maedel, Trustees, mentioned in the 6th paragraph of this bill of complaint; or that said defendant, Mary A. Sullivan, be decreed to reconvey said lots by good and sufficient deed in law to the plaintiff, subject only to said deed of trust next above mentioned, and on her failure to so convey, that a trustee may be appointed to do so.

III. That the said defendants and each of them may be enjoined and restrained during the pendency of this suit, and perpetually thereafter from conveying any title of record or otherwise they may have in said lots and premises out of them, except to the plaintiff, his heirs or assigns.

IV. That a receiver may be appointed to collect the rents of said lots and premises, and to manage the same, subject to the direction of this Honorable Court, during the pendency of this suit.

V. That the said plaintiff may have such other and further relief as the nature of this case may require.

THOMAS J. KILLIGAN.

CHARLES LINKINS,
CHAPIN BROWN,
Attorneys for the Plaintiff.

10 DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing bill by me subscribed and know the contents thereof, that the matters and things therein set forth from my own knowledge are true and those set forth from information and belief I believe to be true.

THOMAS J. KILLIGAN.

Subscribed and sworn to before me this 31st day of August, A. D. 1912.

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN,
Ass't Clk.

Disclaimer.

Filed October 14, 1912.

* * * * *

James Sullivan, one of the defendants herein, is advised that the plaintiff in this cause seeks no relief against him, and that it is not necessary to answer said Bill of Complaint except to state that he absolutely disclaims all interest in this suit, or in any of the matters and things stated in the Bill, and he is willing that the Court should make such disposition of this case, as to it may seem proper, protesting that no decree for costs or otherwise should be rendered against him.

11

JAMES SULLIVAN.

I do solemnly swear that I have read the foregoing disclaimer signed by me and know the contents thereof, that the matters and things therein stated of my personal knowledge are true, and the matters and things stated on information and belief, I believe to be true.

JAMES SULLIVAN.

M. J. COLBERT,
Att'y for Def't.

Subscribed and sworn to before me this 14th day of October, A. D. 1912.

[SEAL.]

FREDERICK R. GIBBS,
Notary Public, D. C.

Answer of Mary A. Sullivan.

Filed October 15, 1912.

* * * * *

For answer to thhe Bill of Complaint filed in the above-entitled cause the defendant, Mary A. Sullivan, states as follows:

1. She admits the allegations of the first paragraph of the bill.
2. She admits the allegations of the second paragraph of the Bill.

12

3. She admits the allegations of the third paragraph of the Bill except that she states that the real estate therein referred to is reasonably worth the sum of Twelve Thousand Dollars instead of Fourteen Thousand Dollars as stated in this paragraph.

4. She denies that on the 30th day of March 1909 or at any other time, she ever urged or importuned the plaintiff to convey to her the said real estate to be held by her as trustee for the plaintiff and for no other purpose, and she denies that she ever gave as a reason for such importunity the habit of intoxication on the part of the plaintiff. She denies that in consideration of said conveyance, she ever stated that she would manage and control said property and collect the rents therefrom and account to the plaintiff therefor. She denies that any such suggestions or requests were made on the 30th day of March 1909 or at any other time. She denies that she ever urged the plaintiff to convey said property to her in trust. This defendant admits that in the months of February and March 1909 the plaintiff was addicted to the use of intoxicating liquors to excess, and had been so addicted both prior to and subsequent to said times. She admits that when intoxicated the plaintiff was unfit to attend to business, and that his excesses seriously injured his health, but she

13 never knew and never heard that his mind was affected thereby except that it was befogged when he was actually intoxicated. She denies that he was ever required for any cause and from any disability to retire from business, but on the contrary, he has frequently declared to this defendant that he did not propose to work any longer and would never engage in business again or engage in any sort of work. She denies that she ever gave the plaintiff any reasons, of kinship or otherwise, for the execution of said deed, or that in executing and delivering the same he might have entire confidence in her. She again denies that she ever made any request of or suggestion to the plaintiff with respect to said deed. She denies absolutely that without the plaintiff's knowledge, consent or direction, she procured the preparation of the deed in question. She denies that she on the forenoon of March 30th, 1909 or at any other time, represented to the plaintiff that she had managed to have a deed in trust drawn up conveying said property, embodying the trusts referred to in the Bill. She denies absolutely that in this connection or any other, she ever made any false representations or any representations whatever in connection with said deed. She does not know whether the plaintiff read said deed, but on information and belief she says that it was thoroughly understood and explained to him. On information and belief she denies that the person presenting said deed to the plaintiff represented the same to be a deed in trust, and no such representation was made by this defendant. She denies that she caused said deed to be recorded, and

14 on the contrary avers that the plaintiff himself caused said deed to be recorded. This defendant absolutely denies that at the time of the execution of said deed, or on the date thereof, the plaintiff was incapacitated either mentally or physically from making a valid deed or contract or that he was in any manner

influenced thereto by this defendant, and she denies that he had not taken independent advice, as will be more fully stated hereafter.

5. She admits that no money consideration passed from her to the plaintiff for the execution of said deed, but that the consideration which she did give him will be more fully stated hereafter. She admits that at the time of the execution of said deed, the plaintiff was living in the house referred to with this defendant and her husband, John Stahl, and that he occasionally at the present time visits said house, and comes and goes as he pleases, but she denies that she ever compelled him to leave said house or made conditions therein unpleasant or unbearable. This defendant further answering said paragraph says that the plaintiff always knew that said deed was an absolute conveyance, and she may have so told him, although she has no recollection of so doing because to do so was wholly unnecessary. She denies that she ever told the plaintiff that she would hold said real estate in trust solely for the plaintiff and that she would reconvey the same to him whenever he might direct. She denies that the plaintiff ever made a demand on her for a reconveyance of said property, and she never knew of any such demand until the filing of this suit. She denies each and every allegation in this paragraph not herein specifically admitted
15 or denied.

6. She admits the allegations contained in the 6th paragraph of the Bill.

7. She states that she is advised that she is not called upon to answer the 7th paragraph of the Bill, except that the name of her present husband is James Sullivan who has no interest in this suit and claims none. Further answering the Bill of Complaint this defendant says that the real estate involved herein was formerly owned by the plaintiff, but in the lifetime of his wife, Mary E. Killigan, he conveyed the same to her, the said Mary E. Killigan, without any consideration other than to protect his said wife and himself against his own reckless and wasteful habits. The said Mary E. Killigan died about five years ago and by her will devised said property back to her husband, the said plaintiff. For many years before the death of said Mary E. Killigan, his wife, the plaintiff was in the habit of indulging at periods in prolonged debauches which usually led him to Providence Hospital for treatment and recuperation. Between such periods, the plaintiff was a capable and successful merchant and conducted a good business, which his wife took care of during these periodical excesses which were at comparatively long intervals and not of prolonged duration. After the death of his wife, the plaintiff lost all interest in his business, and frequently declared that it was his purpose not to engage in business any longer or to work any more in the future, and he has
16 not done so, except for a very short period since the death of his wife. After that time, the plaintiff having no children, and being cast aside by his own blood relatives, invited this defendant to make her home with him and to look after his household, and his comfort, and to attend to the remnants of his business,

all of which she faithfully did without recompense, except that she and her husband and child made their home with him. On numerous occasions she has attended him in his periods of intoxication and has nursed and cared for him and as she verily believes has more than once saved his life when he was desperately ill from his reckless and unfortunate habits. With her own funds this defendant some years ago purchased a business for the sale of cigars, tobacco, newspapers, periodicals etc., at 704 Florida Avenue Northwest, where she is now doing a fair business, which enables her to provide for her family, her present husband being in poor health. The plaintiff was perfectly content to come to the defendant's store and assist in the conduct thereof, declaring that he would never again engage in the tinning and heating business, his former occupation, and this defendant would be compelled to give him money from time to time, and in as small amounts as she could for his personal expenses, clothing and other necessities. She never kept any account against him for these disbursements, although in the aggregate they have amounted to a large sum. She has been repeatedly urging him to settle the estate of his wife, but he has never yet done so, although ordered so to do on dozens of occasions, by the Register of Wills and requested so to do by his own attorney. After

17 the death of his wife, and of his own motion, the plaintiff frequently announced his intention of giving the house in this suit, which is the only property the plaintiff had at the time the deed in controversy was made, to this defendant either by will or by deed, the plaintiff stating that he cared nothing for his two sisters (his only near blood relatives) or for any of his wife's nieces or nephews except this defendant, and further stated that he knew that this defendant would look after him as long as he lived. Shortly before the execution of the deed in controversy, the plaintiff sent for Mr. James B. Archer, a member of the Bar of this Court, to come to see him, the message having been delivered to said Archer by Mr. James Springmann, formerly a Deputy United States Marshal. This defendant up to this time had never known Mr. Archer, had never engaged him in any professional capacity, and had no acquaintance with him. Said Archer called upon the plaintiff and in pursuance of his directions, and his directions alone, prepared the deed in controversy, with the execution of which, this defendant had absolutely — to do. She never importuned or requested or urged the plaintiff to make it, but it was made because the plaintiff stated that if he retained it he would squander all he had, and because he further stated that he knew that this defendant would always give him a home in said house with her and all he needed. This defendant has always told the plaintiff that she would, as long as he lived, provide the plaintiff with a home and all that was necessary for him, although she never made this, and the plaintiff never understood it to be a condition or consideration for

18 said deed. Defendant is still willing to provide the plaintiff with a home and all that is needful for him. Since the filing of this suit, the plaintiff has several times visited her at the house in

controversy, has expressed his regret at having brought this suit and his intention of abandoning it.

And having fully answered the said Bill of Complaint, this defendant prays to be hence dismissed with costs.

MARY A. SULLIVAN.

M. J. COLBERT,
Att'y for Defendant.

I do solemnly swear that I have read the foregoing answer by me signed and know the contents thereof; that the matters and things therein stated of my personal knowledge are true, and the matters and things stated on information and belief, I believe to be true.

MARY A. SULLIVAN.

Subscribed and sworn to before me this 14th day of October, A. D., 1912.

[SEAL.]

FREDERICK R. GIBBS,
Notary Public, D. C.

Joinder of Issue.

Filed November 8, 1912.

* * * * *

The plaintiff joins issue with the defendant on her Answer filed herein.

CHAPIN BROWN,
C. L.,
CHAS. LINKINS,
Attorneys for Plaintiff.

Order on the Question of Admission of Certain Testimony.

Filed April 8, 1913.

* * * * *

This cause was submitted to the court upon the competency of certain testimony offered by the defendant, Mary A. Sullivan, and the plaintiff claimed such testimony to be privileged, on account of the relation of attorney and client. The witness was James B. Archer an attorney at law of this court and he (said witness) had stated on the record of the testimony in answer to the question propounded to him, as follows:

20 "The WITNESS: I desire to state on the record that I was employed by and acted for Mr. Killigan in this transaction, and in the face of this claim of privilege I decline to answer any question in reference to this transaction, unless directed to do so by the Court."

The Court now this 8th day of April 1913, holds and decides and orders, that the said witness having testified and claimed as above appears that he was employed by and acted for, Mr. Killigan in this transaction, any testimony he may be asked to give, is

privileged and not competent to be offered and given in evidence, unless the witness, Mr. Archer, shall be satisfied that his client has waived the privileged communication in some way, and he shall voluntarily answer the question so claimed to be privileged, in that event, if he shall so conclude.

JOB BARNARD, *Justice*.

Decree.

Filed June 5, 1913.

* * * * *

This cause came on regularly to be heard upon the bill, and the answer of the defendant, Mary A. Sullivan; and also upon the waiver and relinquishment of the defendant, James Sullivan, her husband, to any right in the property mentioned and described in the bill of complaint; and also upon all of the testimony taken on behalf of both the plaintiff and the defendant, Mary A. Sullivan, and having been submitted to, and fully considered by the
21 court, it is this 5th day of June, 1913, by the court adjudged, Ordered and Decreed: that the deed from the said plaintiff, Thomas J. Killigan, to the said defendant, Mary A. Sullivan, by the name and style of Mary A. Stahl, dated the 30th day of March 1909, and recorded on the 31st day of March 1909, in Liber 3223, folio 11, one of the Land Records of the District of Columbia, be, and the same is, hereby set aside and held for naught, and the title to real estate and premises mentioned and described in said deed and in said bill of complaint, to-wit: Lot seventeen (17), and Lot G, in square four hundred and forty two (442), in the City of Washington, District of Columbia, is hereby declared and decreed to be vested absolutely and is hereby vested in the said plaintiff, Thomas J. Killigan, his heirs and assigns as fully and completely as if said deed had never been executed by him; subject, however, as to said lot 17, to the deed of trust from the defendant, Mary A. Sullivan, by the name and style of Mary A. Stahl, to Henry H. Bergmann and J. A. Maedel, as Trustees, dated the 25th day of October 1910, and recorded December 17, 1910, in Liber 3387, folio 183, one of the Land Records of the District of Columbia, to secure the German American Fire Insurance Company in the sum of eighteen hundred dollars (\$1800.00) and interest.

And it is further Adjudged, Ordered and Decreed: that the said defendant, James Sullivan, the husband of the said defendant, Mary A. Sullivan, having waived and relinquished in writing any
22 right to said real estate and premises, the said waiver and relinquishment, which is filed among the papers in this cause, is decreed to be a full waiver and relinquishment of any right or title that he may possibly have ever had in the said real estate and premises, and the title to said real estate and premises is now decreed to be in the said Thomas J. Killigan, free from any claim whatsoever of the defendant, James Sullivan.

It is further Adjudged, Ordered and Decreed: that the defend-

ant, Mary A. Sullivan, and the said James Sullivan, forthwith move from and quit said real estate and premises and forthwith surrender to the said plaintiff, Thomas J. Killigan, possession of said real estate and premises and the improvements thereon, being premises numbered 1713, Seventh street, Northwest, Washington City, District of Columbia, and upon the failure of the said defendants to move from and quit said real estate and premises and to surrender possession of the same, the said plaintiff is hereby granted leave and the right to apply at the foot of this decree to this Court in this cause for further and supplemental relief by way of a writ of assistance or other appropriate writ, or otherwise, as he may be advised by counsel, after the expiration of ten days from the date of this decree, and this cause is hereby retained by the court for the purpose of granting any further relief to the plaintiff which may be necessary in execution and enforcement of this decree.

It is further Adjudged, Ordered and Decreed: that the said defendant, Mary A. Sullivan, formerly Mary A. Stahl, be, and she is hereby, perpetually restrained and enjoined from here-
23 after asserting any claim or title to said real estate and premises.

It is further Adjudged, Ordered and Decreed: that the defendant, Mary A. Sullivan, pay the costs of this suit to be taxed by the Clerk, and that the plaintiff have execution therefor as at law.

JOB BARNARD,
Associate Justice.

Order for Appeal.

Filed June 6, 1913.

* * * * *

The Clerk of said Court will note an appeal to the Court of Appeals of the District of Columbia from the decree made herein on the 5th day of June 1913, and issue citation to the plaintiff.

M. J. COLBERT,
Attorney for Mary A. Sullivan.

24 Filed Jun- 11, 1913. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 31253. In Equity.

THOMAS J. KILLIGAN

vs.

MARY A. SULLIVAN et al.

The President of the United States to Thomas J. Killigan, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal noted in the Supreme Court of the District

of Columbia, on the 6th day of June, 1913, wherein Mary A. Sullivan is Appellant, and you are Appellee, to show cause, if any there be, why the Decree—rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 6th day of June in the year of our Lord one thousand nine hundred and thirteen.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clk.*
By F. E. CUNNINGHAM,
Ass't Clerk.

Service of the above Citation accepted this 11th day of June, 1913.

CHAPIN BROWN,
Attorney for Appellee.

[Endorsed:] 8. No. 31253. Equity. Thomas J. Killigan vs. Mary A. Sullivan et al. Citation. Filed Jun- 11, 1913. J. R. Young, Clerk.

25 *Notice for Order to Fix Penalty of Supersedeas Bond, &c.*

Filed June 16, 1913.

* * * * *

Now comes Mary A. Sullivan defendant in the above entitled cause and moves the court to enter an order in this cause as follows:

1. Fixing the penalty of a bond to operate as a supersedeas bond on appeal by said named defendant from the final decree entered herein; and

2. To fix the amount of the bond for costs on said appeal.

LEVI H. DAVID,
Attorney for Defendant, Mary A. Sullivan.

Messrs. Chapin Brown and George R. Linkins, Attorneys for Plaintiff, Thomas J. Killigan:

Please take notice that the foregoing motion will be called to the attention of the Supreme Court of the District of Columbia, holding an Equity Court, on Tuesday, June 17, 1913, at 10 o'clock a. m., or as soon thereafter as counsel can be heard.

LEVI H. DAVID,
Attorney for Defendant, Mary A. Sullivan.

26 Service of the foregoing motion, together with a carbon copy of the same is hereby acknowledged this 13th day of June, 1913.

CHAPIN BROWN,
Attorney for Plaintiff, Thomas J. Killigan.

Order Fixing Penalty of Supersedeas Bond, &c.

Filed June 18, 1913.

* * * * *

On consideration of the motion of defendant Mary A. Sullivan, by her attorneys, of which motion the plaintiff had due notice, and after argument by counsel for the respective parties, it is by the court this 18th day of June, 1913, ordered that the penalty of the bond, to operate as a supersedeas bond on appeal in this cause, be, and the same is hereby fixed in the sum of \$15,000.00; and the amount of the appeal bond, for costs, is hereby fixed in the sum of One hundred (\$100.) dollars. Said defendant, Mary A. Sullivan, appealing from the final decree herein, may execute and file in this cause either the supersedeas bond, or a bond for costs, as she may be advised.

ASHLEY M. GOULD, *Justice.*

27

Memorandum.

June 20, 1913.—Appeal bond approved and filed.

Assignments of Error.

Filed June 25, 1913.

* * * * *

The defendant, Mary A. Sullivan, appellant to the Court of Appeals, respectfully assigns the following errors upon which she relies in her appeal from the final decree passed in the above entitled cause:

1. The Court erred in setting aside and vacating the deed dated March 30th, 1909, recorded in Liber 3223, Folio 11, of the Land Records of the District of Columbia.

2. The Court erred in vesting the title to the real estate described in the Bill of Complaint absolutely in the plaintiff, Thomas J. Killigan, in fee simple.

3. The Court erred in decreeing that the defendant, Mary A. Sullivan, appellant to the Court of Appeals, should forthwith surrender possession of the real estate described in the Bill of Complaint to the plaintiff, Thomas J. Killigan.

4. The Court erred in not dismissing the Bill of Complaint.

28 5. The Court erred in refusing to direct the witness, James B. Archer, to testify concerning matters and things connected with the execution of the deed in controversy, as will appear from the record herein.

6. The Court erred in holding that the testimony adduced on behalf of the plaintiff, Thomas J. Killigan, was sufficient to justify the Court to set aside the deed in controversy upon the allegations of the Bill and the prayers thereof.

M. J. COLBERT,
LEVI H. DAVID,

*Attorneys for Mary A. Sullivan, Defendant Herein,
and Appellant to the Court of Appeals.*

Service of a copy of the foregoing assignments of error acknowledged this 25th day of June, 1913.

CHAPIN BROWN,
Attorney for Thomas J. Killigan, Plaintiff and Appellee.

Extension of Time.

Filed June 27, 1913.

* * * * *

29 On motion of defendant, Mary A. Sullivan, by her attorneys, and after due notice thereof to counsel for plaintiff, and for good and sufficient cause, it is by the court this 27th day of June, 1913, ordered, that the time for settling and signing by the court of the condensed statement of the testimony, on appeal in this cause, be, and the same is hereby enlarged until and including August 15, 1913; and that the time for filing transcript of record and docketing said appeal in the Court of Appeals, be, and the same is hereby extended until and including September 2, 1913.

THOS. H. ANDERSON, *Justice.*

Additional Assignments of Error.

Filed July 7, 1913.

* * * * *

The defendant, Mary A. Sullivan, appellant to the Court of Appeals, files these additional assignments of error, as follows:

1. The Court erred in not dismissing the Bill of Complaint on the ground of the plaintiff's laches in not filing the present suit for more than three years after the execution of the deed in controversy, and for more than three years after plaintiff admitted that he had knowledge of this execution

30 2. The Court erred in not directing and requiring the witness, James B. Archer, to testify touching the execution of the deed in controversy for the reasons appearing on the face of the record.

3. The Court erred in leaving it to the discretion of the witness, James B. Archer, as to whether he should testify or not, accordingly as he might deem proper.

LEVI H. DAVID,
M. J. COLBERT,
*Attorneys for Defendant Mary A. Sullivan and
Appellant to the Court of Appeals.*

Service of the foregoing assignments of error accepted this 2nd day of July, A. D. 1913.

CHAPIN BROWN.

Order Showing Submission of Proposed Statement of Evidence.

Filed July 18, 1913.

* * * * *

It appearing to the satisfaction of the Court that counsel for the defendant Mary A. Sullivan, appellant to the Court of Appeals in this cause, on July 2, 1913, submitted to Chapin Brown, Esq., attorney for the plaintiff, Thomas J. Killigan, appellee to the Court of Appeals, the proposed written statement or digest of all the of testimony, adduced by the respective parties in this cause, and also a copy of the exhibits offered by said parties, and on motion of counsel for the defendant, Mary A. Sullivan, it is this 18th day of July, 1913, ordered, that the said written statement or digest of said testimony and the said exhibits, be, and the same are hereby submitted to the Court for its consideration and action thereon and by the Court referred to Mr. Justice Barnard for settlement.

ASHLEY M. GOULD, *Justice.**Designation for Transcript of Record.*

Filed July 18, 1913.

* * * * *

The Clerk will prepare the transcript of record in this case as follows:

1. Bill of Complaint.
2. Disclaimer of defendant, James Sullivan.
3. Answer of defendant, Mary A. Sullivan.
4. Replication.
5. Order adjudging certain testimony of Archer privileged.
6. Final decree.
- 32 7. Memo.: (a) Appeal noted by defendant, Mary A. Sullivan; (b) Citation issued and service thereof accepted by plaintiff's counsel; (c) Motion by defendant, Mary A. Sullivan, to fix penalty of supersedeas bond and also amount of bond for costs on appeal; (d) Order fixing amount of supersedeas bond in sum of Fifteen Thousand (\$15,000.00) Dollars and cost bond, One Hundred (\$100.00) Dollars; (e) Bond for costs for One Hundred (\$100.00) Dollars on appeal, with surety, approved and filed.
8. Original and additional assignments of error.
9. Memo.: Order extending time until and including August 15, 1913, for signing by the court of statement of evidence, in condensed form, and enlarging time until and including September 2, 1913, for filing transcript of record in Court of Appeals; and memorandum of additional order or orders, if any may be passed, extending the time in regard to said matters.
10. Memo.: Statement of evidence, with exhibits in case, sub-

mitted to the Court on July 18, 1913, and as to order showing such submission.

11. This designation.

M. J. COLBERT,
LEVI H. DAVID,

*Attorneys for Mary A. Sullivan, Appellant to the
Court of Appeals.*

33 Service of the foregoing designation is hereby accepted this 18th day of July, 1913, a carbon copy thereof being delivered to me.

CHAPIN BROWN,

*Attorney for Thomas J. Killigan, Appellee to the
Court of Appeals.*

Memorandum.

August 8, 1913.—Digest of testimony on appeal signed by Justice Barnard.

34 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 33, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 31253 in Equity, wherein Thomas J. Killigan is Plaintiff and Mary A. Sullivan et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of August, 1913.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN,
Assistant Clerk.

35 In the Supreme Court of the District of Columbia.

Equity. No. 31,253.

THOMAS J. KILLIGAN, Plaintiff,

vs.

MARY A. SULLIVAN and JAMES SULLIVAN, Defendants.

This is to certify that the following is a true and complete statement in simple and condensed form, of all of the testimony, of all

witnesses, and the exhibits adduced by the parties in the above entitled cause, considered by me as the basis upon which rests the final decree entered by me in this cause:

THOMAS J. KILLIGAN, testified, as follows:

That his age is 53; resides at 1713 7th Street, N. W., but is temporarily staying at 723 Third Street, N. W., occupation, tinning and heating, but has not been engaged in business for about four or five years; that he formerly conducted business at 1713 7th Street, N. N.; that property is on Lot 17 and G, Square 442, being the property involved in this suit; that in said premises witness had conducted a heating and tinning business for about twenty-five or twenty-seven years; Q. Did you ever own that property? A. Yes, sir, about 25 or 27 years ago witness bought that property, which was then unimproved, and paid for it out of his business; that property is improved by a store and cellar and two rooms in the rear on the first floor, and five rooms and bath on the second floor, which improvement witness caused to be erected a few years after he bought the lot, paying therefor with funds he earned out of his business; no money or
36 property was ever given to witness. When he bought the lot he was married, and had been for about six or seven years. His wife died about five years ago, and witness never married again; that witness never had a child or children. He used the store to carry on his business, and witness, his wife, his wife's nephew and niece, Edward and Margaret Sullivan, whom witness took to raise after they lost their parents, used the rest of the property as a residence. The defendant, Mary A. Sullivan, formerly Mary A. Stahl, is a sister to said Edward and Margaret Sullivan. That witness is now and has been since May, 1912, residing with his sisters, Katherine and Josephine Killigan; that he had not paid any board and is not now paying any board or anything. Witness has cousins and a brother who has been living in Philadelphia for about two years; that on March 30 or 31st, 1909, witness owned no other property than the real estate mentioned excepting a small amount of furniture located in premises 1713 7th Street; that said furniture was of no great value; that furniture is still on the premises 1713 7th Street; that on or about March 30 or 31, 1909, witness conveyed the said real estate to Mary A. Stahl, who is the same person as Mary A. Sullivan named as defendant in this suit; at that time her married name was Stahl. Her husband was John Stahl who died in February, 1910. That witness made the deed to Mary A. Sullivan after the death of witness's wife, which occurred June 21st, 1909,—I should say 1908.

The witness then proceeded as follows:

Mrs. Stahl asked me to deed the property to her in trust and said that she would hold it for me for my benefit. I did not know that I conveyed it to her absolutely. I did not find it out for probably
37 two or three weeks. I had been drinking pretty heavy at that time, and did not know I had given her an absolute deed until sometime after I had sobered up. Asked by plaintiff's

attorney, How the witness found that out, he answered. I asked her where the deed was. She told me it was at the Record Office and that it was an absolute deed to her. I asked her if she signed any paper or deed showing the real transaction. She told me no, and that she would hold it for me in trust and deed it as I wanted it. That was after I had signed the deed and after I had sobered up. I had been drinking pretty hard. I had been drinking very hard that day and for some days previous and really did not know what I was doing. I did not read the deed nor was it read to me. (The plaintiff thereupon offered in evidence a certified copy of the deed in question, which is hereinafter set out in full, marked "Plaintiff's Exhibit No. 1". I was in no condition to understand the deed. I was too much under the influence of liquor. I got the liquor at the Thyson House about two blocks away. On that day (meaning the day of the execution of the deed) I took my first drink about half-past four in the morning. I could not sleep and went out to get a drink. There was some left in the house,—a bottle on the side board for me. Mrs. Stahl left it there for me. She told me she left it there. I drank some out of that bottle. I had been drinking for some days before that very heavy; too much to know what I was doing. I sobered up in three or four days after I signed this deed. After I signed the deed, and after she told me she would hold it in trust for me, I had other conversations with her in which she told me she was holding it in trust for me. She always spoke of it as my property. I was then living at 1713 7th Street, N. W. Mrs. Stahl her son and her husband were then living with me. They commenced to live with me right after the day I buried my wife. She came back to the house from the funeral. My wife died in June 1908, and
38 Mrs. Stahl commenced to live with me with her husband and child after that. She continued to live with me until March 31st, 1909. She did not treat me as well after I signed the deed as she did before. Mr. Stahl died in February 1910. She is now married to James Sullivan. She married him about a year ago (meaning the year before, February 31 1913). Her first husband was a butcher employed by Whitfield, on Louisiana Avenue. After she married her present husband, there was a change in conditions. At times there was not enough to eat, and things became so unbearable that I had to leave there. It was very disagreeable. After I had a conversation with her, which was after I sobered up, I asked her to give me a deed to the property or a paper showing the real transaction. She promised to do so. I finally asked her a few months after the filing of the deed. I asked her to give me a deed or a paper before I left the house and she refused to do so. That was three or four weeks before I left the house. Before that she had refused to transfer the property to me. Sometime before that I asked her to deed it back to me and she refused. That was possibly a month or more before I left the house; possibly a month or two. Prior to that I had asked her to deed it back to me. I asked her to deed it back to me or give me a deed or paper showing the real transaction and she promised to do so, and finally refused to do so when I asked her. At times there was nothing to eat there and

things became generally disagreeable and I did not like it and left. When I made the deed the property was subject to a trust of \$1,600. This is not the same trust now on the property. The interest had accumulated and we took it away from that trust and we put one of \$1,800.00 on the property. The difference of \$200. went to pay interest that had accumulated when the store was vacant and for other expenses of drawing up the trust. This was done with my approval and direction. She consulted me about it and we agreed to do that. I had nothing to do with the preparation of the deed that I signed on March 31st, 1909. I neither directly or indirectly directed the deed to be drawn. Before she asked me to deed the property to her in trust she asked me to deed it to her absolutely, but I refused. This was at the house in question in the dining room. She asked me quite a few times, but nobody else was present. At some of the conversations I had with her on this subject, Mr. James Springman, former deputy marshal, was present. He was present very often. When he was there she asked me to deed the property to her in trust and I refused. She then turned around and asked Mr. Springman if he would not try to get me to do so. Springman was present probably a half-dozen times when she talked about this matter. Springman is now dead. The consideration of \$10.00 named in the deed was not paid to me; not a cent. She collected the rents after the conveyance. It was not rented when the conveyance was made, but afterward she rented it directly. At one time Shannon & Luchs were the agent. She consulted me about putting it in the hands of an agent. It was rented to a man named Sleight, a furniture dealer. Before that it was rented for rummage sales, by which I mean church sales where they sold second hand clothing, old furniture, etc. The store was not rented for three or four months after I signed the deed. During that time there was nothing coming in. Sleight occupied the property going on two years. (At this point the original deed in question was produced by the attorney for defendant, Mrs. Sullivan, having been previously requested to do so by plaintiff's attorney, and was offered in evidence by the plaintiff's attorney and was marked Plaintiff's Exhibit No. 2, which is the deed of which certified copy had been offered as plaintiff's exhibit No. 1. The rummage sales occupied a week or two weeks at a time. From the rents which Mrs. Sullivan received she paid the interest on the deed of trust on the property. I don't know what she did with the other. She did not give it to me. I asked her for the rents. Immediately before I left the house, condition- had become pretty bad. At times I could not get anything to eat, and things had become disagreeable in general and I left. I did not like the way things were going. Sometimes she would pass me and would not speak to me, and things became disagreeable in general. I went out of business about four or five years ago, before I made the deed in question. After I gave up business I had not, and even now have no other means of support besides this property. I have no other property. This deed of trust, first \$1,600.00 and afterwards \$1,800.00 covered only Lot 17. Lot G is the rear lot. I refused \$14,000 for this property. When I

made this deed the market value was about the same; that is, the whole property. The market value ought to be about the same now. It is not true that after the death of my wife I was cast aside by my blood relations. They never did. They always treated me alright. When my wife was living they called to see me frequently. In the last six months of my wife's illness, they treated me just about alright, I guess. My wife was sick about five or six months. When she was sick my oldest sister, Katherine, attended her. She came up to the house and stayed with my wife until she died. That was about three or four months. While she was there, she nursed my wife. Since my wife's death my relatives have treated me alright. They called to see me and Mrs. Stahl would not let them in when I was sick. They told me she would not let them in. I asked Mrs. Stahl about it and she told me "No" she did not want them there. That was after my wife died. It is not true that I did not care anything about my wife's nieces and nephews, except Mrs. Sullivan. I kept Margaret and Edward and educated them. I had a policy of \$5,000.00 on my life

41 I do not know where It is. She is supposed to have it. I left all my papers up to the house. I assigned that policy to Mrs. Stahl. I was drunk at the time I did it. She asked me to do it and I did it. That was before I gave this deed. That was a life policy payable at my death. It was in the Central Union of Ohio.

On cross-examination the witness testified as follows:

I bought this property about 25 or 27 years ago, and built the building on the lot a few years later, and conducted a successful and prosperous business on the property for many years. During my wife's life time, I was in the habit of sometimes of going on sprees most every six or ten months; once or twice a year. I usually wound up at Providence Hospital. That habit continued to grow upon me, but in between times I attended to business capably and successfully. I conveyed the property to my wife, but don't remember just when I did it. I did it on account of my habit. I wanted her to hold it for me. I was afraid to trust myself. That was some years before my wife's death. I can't just remember exactly. I guess it was ten years before my wife's death. I conveyed it to her without reservation or trust whatever. There was no desire to create any trust in that conveyance. I had entire confidence in her honesty and her desire to protect me. When my wife died she gave the property back to me by her will. In conveying the property to my wife, she gave me no consideration for it except that she attended to my household affairs and helped me in my business. When she died I did not invite Mrs. Stahl to come and live with me. She came back from the funeral and stayed there without any suggestion from me. She came back and immediately was taken ill and went right to bed. I think she intended to come and live there. She

42 was taken ill but she stayed right there. I did not order her out of the house, and consented that she should remain there. She took care of my household just as my wife had done. I

was on good terms with her then and had every confidence in her ability to be my housekeeper. She performed this duty acceptably to me at that time. I had known her since she was born. I guess she was the favorite of my nieces. I was very fond of her and she of me. I have been out of business for five years. I earned some money about six months ago. I have had no regular occupation for nearly five years. During about the last eight months (this date being Feby. 1913) my sisters have been taking care of me. I am now living at 723 3rd Street N. W. During the last five years I have lived part of the time at 1713 7th Street until I had to leave. I got one suit of clothes a year. Mrs. Sullivan paid for that. I got very little pocket change. During this time I was drinking considerably. I collected some money that was owing to me and my sisters gave me some. They did not know what I did with it. I once made a will. It was made by Mr. Brown who used to be in the Colorado Building. I recognize my signature to the will. Maybe it was prepared by James B. Archer. I cannot remember. I cannot remember whether I signed it or not. I recognize my signature. It appears to be firm and as good as I have ever written it. I signed it in the presence of Dr. Roman. I had been drinking heavily. I think I signed that paper. I think I remember signing it. Nobody ever persuaded me to sign it. I did it of my own free will. I was taken right ill at that time and wanted to provide for the future. I made this of my own free will. Mr. James Springman got me to go to Mr. Archer to have the will prepared. Mr. Springman was a friend of mine but not a companion. I know him pretty well. He suggested that I make the will. In that will I left my sisters
43 \$1000.00 each, everything else to Mrs. Stahl absolutely and in fee, and made Mr. Springman executor. I suppose I knew what I was about when I made this paper. That is, I don't know as I did. I left so little to my own sisters because she influenced me. She knew I was drunk and I was easily persuaded. When I stated that I made this will of my own free will I take it back; I withdraw that statement. Maybe Mr. Springman suggested the making of the will; I cannot remember. My niece did persuade me. I happened to name Mr. Springman as executor because he was in the habit of visiting the house. I mean to say he visited Mrs. Stahl, about once a week or every ten days. I did not leave my sisters more than I did because I was influenced by Mrs. Stahl. She said she did not want me to visit my sisters. I am in good health now, perfectly vigorous and healthy, and my mind is just as clear as it ever was and always has been, excepting during the periods of intoxication. Since my wife's death I may have said I never intended to work any more. I don't know as I did work any more. As a matter of fact, since that time, I have only done small jobs. I knew Mr. Archer for some years. Mr. Archer did not attempt to use any improper influence on me. There was no reason why he should. I made this will because my niece by marriage persuaded me to do it. I never objected to her staying in the house after my wife's death. She would not let my sisters in to see me during all these years after my wife's death. My sisters did not

come there once a week. Maybe I said that after my wife's death my sisters were on friendly terms. Mrs. Stahl wouldn't let them come there when I was sick. After this will of October 1908, I made the deed in controversy in the following spring because she asked me to do it. She lead me to believe that she would hold the

44 *the* property in trust for me. She asked me to deed the property in trust and said she would take care of it for me. I refused to make a deed to her outright. Maybe it was Mr. Archer who wrote the deed. I signed it at the house. I had been drinking pretty heavily. I don't know as I do remember where I signed it. I did not engage Mr. Archer to prepare the deed. He did not send me a bill. He rendered me a bill for former services in a suit I had against somebody who owed me money. I engaged him to collect some money for me in a suit. He was my lawyer in that suit. When this will was made and when the deed was made I just knew of Mr. Archer, that was all. I did not have much to do with him. I never paid him for writing that deed. He never wrote me a letter demanding payment. A few weeks after the deed was made I asked Mrs. Stahl to give me a paper showing the real transaction. I did not remember that I had signed the deed until I had sobered up. Then I remember she told me that I had given an absolute deed, and I asked her to give me the paper showing the real transaction that she held the property in trust for me. She said she would give me a deed or paper to that effect. She did not give it. I asked her and she refused to give it to me. She told me it was in the Recorder of Deed's Office and that it was an absolute deed. I asked her to give me a paper and she refused. That was about four years ago. The reason I waited so long before trying to recover the property was that I just left to go on from time to time. I made up my mind to do it and just put it off from time to time, thinking it would come out al- right. During these years I lived at the house as I always did until May 1912. Since May 1912, I never ate there or slept there. The last time I slept there was in the spring of 1912. I never slept there since this suit was filed. I went there

45 on my own account. I look on it as my home. I was never refused admission, and the locks were never changed on me. Half the time I did not have enough to eat. I don't know that I had what she ate. We did not eat together. I had my meals by myself. I supposed she furnished them. I wasn't in the habit of coming in at every hour of the day or night and wanting something to eat. On the morning of the day of the execution of the deed I went out in the morning about half-past four to get a drink because I was nervous. I had drunk what was in the bottle that had been left in the house for me. I was served at the Thyson House. I was very nervous. I wasn't sober, but I wasn't refused a drink because of my condition. Besides not speaking to me as she passed me, things became generally disagreeable in the house and I could not stand it. Mrs. Stahl would not speak to me or notice me. She did not have my meals for me. That is all. When I was sick she did very little for me. I never stated that she saved my life on many occasions. The last time I slept in the house was

somewhere around May or June, 1912. Q. "That was before this suit was filed?" A. "That was after." Q. "This suit was filed last August?" A. "That was before." I have not been in the house and slept there since this suit was filed. The second trust was placed on this property after the deed to Mrs. Stahl was made. I went with Mrs. Stahl to execute the papers. Q. "Did you tell any of those people connected with the Oriental Building Association that you were the real owner of that property?" A. "They knew it." The title was in her name but they knew that I owned the property. When the last loan was made I did not go to the German-American Fire Insurance Company. I knew that Mrs. Stahl was going. She consulted me about it. I knew that I had to get a new loan to pay up the back interest. I knew from whom the new loan was to be obtained. I don't know that I told these people that I was
46 the real owner of the property. I don't know that I did.

I knew Mr. Bergmann, one of the officers of the German-American Fire Insurance Company. I did not see him. I didn't think it was necessary. I knew that there was an absolute deed in somebody's else name, and I knew that the person who had persuaded me out of this property was borrowing money upon it. I don't know that I told Mr. Bergmann or anybody else connected with that society that I had given this property to Mrs. Stahl through her fraud. Mrs. Stahl married her present husband over a year ago. I never told him that his wife had obtained this property by misrepresentation and fraud. I never had any conversation with him about it. Q. "Did you ever tell anybody that Mrs. Stahl defrauded you out of that property?" A. "I guess I did; yes, sir." Q. "Can you name one person that you told?" A. "I can't just now, no." My relations with Mr. Stahl were pleasant. I may have complained to him that his wife defrauded me. I have no recollection that I did. My relations with Mr. Sullivan are not very pleasant. I know Mr. Hufty who took the acknowledgment to the deed. I think his name is Lawrence Hufty. I used to do work for him when I was in business. I recollect that he came to my house to take this acknowledgment. I was pretty drunk, and I haven't any clear recollection of signing the deed. That is all I can tell you. He ought to have known my condition. He came up there twice. I was told he came there twice. I don't remember the first day; I was out. I was drunk, but I had left the house. I remember he came there the next day. He told me he had a paper he wanted me to sign. I didn't know what it was. I asked him and he told me it was a deed. I asked him what the deed was for

and he told me it was for my property on 7th St. I didn't
47 know what I was doing. I had been drinking pretty heavy.

Q. "Didn't you just this moment say that you asked him what it was and he told you it was a deed for the 7th Street property?" A. "No, sir; that was not right." Q. "Then you withdraw that statement?" A. "I withdraw that statement." Q. "What do you remember about this visit there; tell me?" A. "I don't remember anything about it. I was drinking too much at the time to remember anything." Q. "Do you remember that Mr. Hufty

came up there to see you?" A. "No, sir; I do not." "Mrs. Stahl told me that he came up there. I didn't see him." Q. "Have you any recollection yourself, independent of what Mrs. Stahl told you, of Mr. Hufty coming there to see you?" A. "No, sir; I have not. None whatever." When I signed my name to this paper before this notary, I didn't know what I was doing. Mrs. Stahl told me afterwards that I had signed a deed absolutely to her. That was my first knowledge of it when I sobered up. I got \$35.00 or \$45.00 a month from Sleight after he rented the place. The store is idle the last time I passed it. Out of this \$35.00 a month, interest on this mortgage was paid the taxes were paid and Mrs. Stahl retained the balance. I don't know what became of it. Mrs. Stahl bought a little cigar store on Florida Avenue shortly after the death of her husband. I don't know where she got the money from. She got about \$360.00 under my wife's will. I had been up in that store helping around the business constantly day and night. I can't remember who it could be I made a complaint to. I know I complained to her brother and her sister, Mrs. Ruppert, that she had defrauded me. I don't know where I did that just now, but I did complain. Mrs. Stahl is the beneficiary of the \$5000.00 policy.

48 She asked me to make her beneficiary. I wasn't drunk when I did that. I got the policy from the Central Union of Ohio, one of the largest and strongest companies. At that time Mr. Raymond was the agent for that company. He came to the house after me. I wasn't drunk at that time. I took the policy out for my wife, and afterwards transferred it to Mrs. Stahl after my wife's death. I don't know as I knew what I was doing. Q. "Do you mean to say that this company would have accepted an assignment of this policy without your knowing anything about it?" A. "I must have known something about it." Q. "Why did you not make that out in the favor of your sisters?" A. "She influenced me to make it out in her favor."

On Redirect Examination the witness testified as follows:

This life policy was taken out a long time before the assignment to Mrs. Stahl. I had drunk all of the whiskey that was in the bottle referred to and had to go out to the Thyson House to get a drink that morning. Mrs. Stahl had brought that bottle in there. On the day that I signed the deed she brought a bottle in and laid it on the side board. That was before I signed the deed. I had drunk all that was in the bottle the night before. I got that bottle myself. The bottle she brought in was brought in on the day that I signed the deed. I discovered that I had made this absolute deed some days after I sobered up. I asked her where the deed was and she told me at the Record Office, and that it was an absolute deed to her. I asked her if she had signed any papers showing the real transaction and she told me, "No", but that she would hold it for me in trust. She told me so on that occasion. Two or three months before I filed this suit, she refused to give me this paper. Prior to that time she had considered it as my property. When I said

“two or three months, I mean prior to filing this suit”.
49 During these negotiations about the new loan she had treated it as my property. Mr. Springman used to come to the house to see Mrs. Stahl, not me. He kept that up until he was taken sick. Mr. Brown drew the will referred to. I cannot recall his initials. He used to be with Mr. Frank Browning. His name was Percival Brown. I had engaged Mr. Brown to write the will. I had sent for him I was sick at the time. I thought I was going to die. I had gastritis of the stomach. Mr. Brown drew the first will for me, but that is not this will—that was offered in evidence.

Mr. COLBERT: I made that assertion (namely, that Mr. Archer had drawn the will which had been offered in evidence) because his (Mr. Archer's) name appears on the back of the paper. It is on the back here. I will say for the record. I made that assertion because his name appears printed on the document on the back of the paper.

The witness continued—

I cannot tell who drew that will. I can't tell how I happened to execute it. I don't know whether I directed the use of the following language of the will: “wishing to make an orderly arrangement of my wordly affairs, whilst my physical condition will permit it to be done to my satisfaction.” I can't tell how James W. Springman happened to be named as executor by me. Mrs. Sullivan asked me to make a will in her favor on three or four occasion—at the 7th St. property. She never asked me to make a will in the favor of my sisters. I wouldn't have made a will in Mrs. Sullivan's favor if she had not asked me to do so. I wouldn't have conveyed this property to her in trust if she had not asked me to do so.

On Recross-examination the witness testified as follows:

50 I certainly do mean to suggest that Mr. Springman came to my house for the purpose of seeing my niece and not to see me. I can't tell whether he had any improper motive in doing so. I don't know that I had any objection to his coming. I didn't make any objection to his visits. I had known Mr. Springman five or six years, running back from the present time. I don't think he has been dead that long. I knew him twenty years ago. He was a friend of mine. Mrs. Stahl's husband was living at that time, but her husband was out when he (Springman) came there. There was a period of about six months between the death of Mrs. Stahl's husband and Mrs. Stahl's marriage to Mr. Sullivan. Perhaps it was about a year or not quite a year. Before that he (Springman) used to come up there and visit the house. I don't know whether it was me or not. He would visit the house. I don't know which it was.

On Redirect examination the witness testified as follows:

Mr. Springman came to the house about a month after my wife's death, and he came off and on then until the time of his own death. In the will that Mr. Brown drew for me I left this property to my wife. That will was made in my wife's lifetime. Q. “You didn't

have anything to leave, did you?" A. "I did at that time. I don't think I conveyed it at that time.

51 KATHERINE KILLIGAN testified as follows:

I reside at 723 3rd Street, Northwest. I am 56 years old. The plaintiff is my brother. I am his oldest sister. The plaintiff has been living with me and my sister since last May. The relations between my brother and myself have always been pleasant. My sister and I never cast him aside. We always stuck to him, but when I would go out there, Mrs. Sullivan would act so awfully mean, and acted like she did not want us, and would not let me or my sister see him when he was sick. When my brother's wife was living, I was always accustomed to going up there to the house. During her last sickness I was there every night and stayed every night, and stayed with her until she died. I helped to wash her and lay her out. I helped the undertaker. There never was any objection to my coming there. I was not encouraged to go there by Mrs. Stahl. Prior to that time, I went there because I liked my sister-in-law. I did all I could for her. Mrs. Stahl objected three times to my visits. I went up there and could not get it. I could see her from the front door back into the kitchen, but she wouldn't answer the door, and then one time, I went there and there wasn't anybody in but my brother, and I opened the door and went right back, and he was so drunk that he didn't know me or my sister at all. Before we came away she came in and I said, "Ada, what in the world is the matter with Tom?" How much whiskey did you give him? He looks as though he is going to die". She answered, "No, indeed, he will be al- right. I give him from a quart to a half-gallon a day." Q. Do you remember what condition he was in on the 31st day of March, or about that time? A. No, I don't know anything about that because she treated us with such

52 contempt that I stopped going out there." He would always come to the house when he was on these drunks. He would come down there very sick and I would put him to bed and take care of him. We were always very friendly. I always thought that Mrs. Ruppert, whose maiden name was Maggie Sullivan, a niece of Mrs. Killigan, was his choice. Mrs. Ruppert is a sister of Mrs. Sullivan. I always thought that he treated his other nephews and nieces very well; always kind and good to them. He educated Mrs. Ruppert and Edward Sullivan, his niece and nephew. My means of support are I keep a rooming house, and my sister works in the Government Printing office. That is the way we get along, and we have no other means of support. My brother is paying us no board.

On Cross-examination the witness testified as follows:

After Mrs. Killigan died I visited my brother's house very often, but Mrs. Stahl never wanted me at all. She didn't say anything to me but just treated me with contempt. At one time she did say something to me. I went out there and she was there, and I asked her, "Where is Tom"? and she said, "He is out and I don't

expect him home until 11 or 12 o'clock tonight. I don't think you can see him." I don't think I went out there after that. I guess that was about three years ago. Maybe not quite three. It was five weeks after his wife died when she took care of his house for him that she said she gave him from a quart to a half-gallon of whiskey a day. I asked her and she told me. I said, "He looks so stupid. He looks to me like he is under a drug." She said, "No indeed, he is drunk". I asked her how much whiskey did she give him, and she said from a quart to a half-gallon a day.

53 On Redirect examination the witness testified as follows:

He looked like he was under a drug. He didn't know us at all. She said he was drunk. She would give him between a quart and half a gallon a- whiskey a day five weeks after his wife had died.

JOSEPHINE KILLIGAN testified as follows:

My age is thirty-five. The plaintiff is my brother. I live at 723 3rd Street, Northwest. I am employed in the Government Printing Office; for the last fifteen years. I am a piece-worker. I make different amounts according to the work. Sometimes it is pretty good and I make \$2.50 a day; some days not that. I haven't any regular salary. My brother is living at 723 3rd Street, and has been since last may. He pays no board. It is not true that after the death of my brother's wife he was cast aside by his blood relations. We have always been very kind and good to him. I don't remember that he has stopped at my house every night since last May. He has come there when he was under the influence of liquor; quite frequently. At times he would come there and my sister would nurse him two or three days at a time. When he was drunk, my sister would nurse him and get him al- right again. Of course, he would have to stay there all night then. My work is in the night time. He would be there when I was going away and when I returned in the morning. Prior to May (1912) for the last ten, fifteen or twenty years I saw my brother quite frequently. I guess a couple of times or two or three times in two weeks. It may be a little longer, but about that time. There never was any ill feeling between my brother and myself. After his wife's death, I
54 visited there at his house twice, but I was treated very badly by Mrs. Stahl, and did not go any more. She acted as though she didn't want us. On one occasion she allowed me to see him. He was sick in bed, and we walked right back in the dining room, and he was sitting on the chair drunk, and he didn't know me at all. That is the same occasion referred to by my sister. We asked Mrs. Stahl what was the matter with him. She said he was drunk. She said that she had given him whiskey. I asked her how much, and she said between a quart and a half-gallon a day. I didn't say anything about his being drugged or anything to her. My sister asked her that.

On cross-examination the witness testified as follows:

I have only seen my brother in his house two or three times since his wife's death. I don't think my brother has been addicted to the whiskey habit all his life. I never saw him drink so as he has since his wife's death. He was very devoted to her, and it seemed to break his life in half when she died. He gave up his business and everything else. I certainly mean to be understood that Mrs. Stahl fed him with liquor. My basis for making that statement is from what Mrs. Stahl told me herself. That is the only reason I have for saying so.

LAWRENCE HUFTY testified as follows:

I am of lawful age. On the 30th of March, 1909, I had occasion to go to Mr. James Archer's office. He telephoned for me to come there that he wanted me to take an acknowledgment to a deed. I went there, and Mrs. Stahl and Mr. Archer were present. I think she had a young child with her. On that day Mr. Archer gave me the deed (Plaintiff's Exhibit No. 2) from Thomas J. Killigan to Mary A. Stahl to be signed. The date was filled in at the time the paper was delivered to me. Mrs. Stahl told me that Mr. Killigan would be at the store long about one o'clock, I think, that afternoon, I mean at the store where Mr. Killigan was living on 7th Street, between R and S. On March 30th and 31st, 1909, I was a commissioned notary public. That afternoon I went up there, 1713 7th Street, Northwest, at the time that she stated. I am not positive as to the hour though. That time I saw Mrs. Stahl. Mr. Killigan wasn't there. She said he had gone out. She said she had kept him there as long as she could, but she couldn't hold him there any longer. He had gone out. I asked her if she wanted me to come back again that afternoon, and she said she didn't think she could get him to sign that afternoon, and it was suggested either by Mrs. Stahl or myself that I stop by in the morning on my way to the office about 9 o'clock. On March 31st, I saw Mrs. Stahl again. She stated that Mr. Killigan had gone out. She said she would keep him when he got back, and I told her I would come back again that same morning whenever she would call up. I got a message later on in the morning either from Mrs. Stahl or Mr. Archer. I don't remember which. It was long about 11 o'clock. I went in the store. Mrs. Stahl was in the back room. I saw her. Mr. Killigan was lying down on the couch in the back room back of the store. Mrs. Stahl called him and he got up.

The deed is here shown witness and he identified his signature and seal. It (the acknowledgment) appears to be dated March 31, 1909. Mr. Killigan signed the deed. I think Mrs. Stahl got the pen and ink. I don't remember where she got it from.

Q. Please state Mr. Hufty if you noted whether or not Mr. Killigan was under the influence of liquor? A. Well, Mr. Killigan had been drinking. Q. How long were you there, Mr. Hufty? A. Long enough for him to sign his name and to take the acknowledgment. Q. State whether or not he read the

paper or the paper was read to him in your presence. A. I explained to him what the paper was. I told him it was a deed to the property mentioned in the deed."

On cross-examination the witness testified as follows:

I imagined Mr. Killigan knew what he was doing. Apparently he knew what he was doing. I took the acknowledgment and certified that this man appeared before me and acknowledged this to be his deed. Q. "Was he a drunken man?" A. "No, sir. Q. "Was he sober?" A. "No, sir." Q. "Did you explain to him what he was doing?" A. Yes, sir. Q. "Do you now claim he didn't know?" A. "No, sir. I don't claim he didn't know. Q. "Did he know what he was doing?" A. "I don't know. Apparently he did. Q. "Wasn't it your bounden duty to know?" A. "It was my duty to take his acknowledgment if I thought that he knew at that time. Q. "Did you not think so?" A. "I did, yes sir." — "He wasn't persuaded by you to do anything -hat he ought not to have done? A. "No, sir." Q. "Was he sober?" A. "No, sir." Q. "Do you mean to tell me that you would take the acknowledgment to a deed of a drunken man?" A. "He wasn't drunk." Q. Well you say he wasn't sober? A. Apparently not. He appeared to have been drinking. Q. Well, did he know what he was doing? A. Apparently he did. Q. What do you mean by that? A. I mean he seemed to know what he was doing. I was only there about five minutes. I knew what I was doing and felt that I was doing my duty. I explained what this thing was to this man. I told
57 him it was a deed to that property; a conveyance to Mrs. Stahl. He seemed to know and understand it. I had no doubt about it then. I didn't ask him why he was doing it; it was none of my business. He didn't tell me what he was doing. I told him what it was. Q. "Didn't he know before you told him?" A. He seemed to know all about it. Q. What did he say about it? A. He didn't say anything about it. He signed it after I told him what it was. Q. He seemed to know all about it? A. I explained to him what it was and he signed his name there."

I was first called into the transaction the day before by Mr. James B. Archer; in his office. I had no knowledge of what I was to do. Mr. Archer told me he wanted me to take an acknowledgment to a deed. The grantor wasn't there at the time. I went up to the 7th street hous later in the day. Q. "Mr. Hufty, when this man signed this deed did he know what he was doing, in your judgment?" A. I have answered that question four or five times already. Q. Well I want you to answer that question again. A. Yes, sir, I will answer it the rest of the day if you want me to. Q. When you took this man's acknowledgment to this instrument did he, in your judgment, know what he was doing? A. I thought he did, yes sir."

Redirect examination:

I was summoned to appear here today.

EDWARD J. SULLIVAN testified as follows.

My name is Edward Joseph Sullivan. My age is 24. Occupation, driver for Holmes Baking Company. The defendant, Mary Ada Sullivan, is my sister. During the month of March 1909, I was living with my uncle, Mr. Killigan, at 1713 7th Street, Northwest. My sister, Mrs. Stahl and her husband and their boy
58 John were also living there. At that time, Mrs. Sullivan was Mrs. Stahl. I had been living there since I was seven or eight years old. My aunt and uncle, Mr. and Mrs. Killigan, took care of me after my grandmother died. Mrs. Killigan was my mother's sister. After the death of Aunt Mary (Killigan) for a year or a year and half afterward he (my uncle, Mr. Killigan) was constantly drinking all the time; on a big tear. He never drank moderately. He always drank to excess, you might call it. He didn't know what he was doing half the time. He was just the same as a man going around that didn't have his right mind. He was drunk from the time of Aunt Mary's death right on through a year and half. It must have been in the month of March 1909 too. When he was drunk he was just the same as a beast. He didn't know what he was doing. He would come and go, and if he happened to find himself in Southwest, or some other place, it didn't make any difference to him. He was always that way. I had known him long enough to know that. I ate at the house, 1713 7th St. Northwest. Prior to March 1909, the condition of the meals at the house was just moderate. Subsequent to that time they got worse and that was the reason I left; partly the reason. The other reason my sister and I had an argument. It started on the meals, because they were poor. When I was minding the store and working, I would come home late in the evening the meal would be cold. I don't know what time it would be cooked. One evening when I came home my sister tried to make me eat some cold meat and she wouldn't heat it up. That is the reason we started the argument and I left there then. At supper and breakfast, Mr. Killigan and I usually ate together. John Stahl died in March, 1910. He didn't die at the house. I was living at the house at the time of his
59 death, and lived there four months afterwards. I am not sure whether it was February or March, 1910 when Mr. Stahl died. It was about that time. I know it was in the fall of the year, because when we went to the hospital there was snow on the ground. I think it was in March 1910 that he died. Mrs. Sullivan, who was then Mrs. Stahl, never said anything to me about Mr. Killigan having conveyed this property to her. She never said anything to me about it. Mr. Killigan told me about it after I left there. I guess about a year ago (witness is testifying on February 10, 1913) when I had a talk with him up in the store. One day I dropped up there and he told me at that time that he had turned the property over to her and that he knew she would treat him right and that he had turned it over to her to keep for him in trust. Then I told him at that time that "you had better watch yourself because she had done me dirty and would do the same to

him." He said he had all the confidence in the world in her. I met him one day in the part about six months ago, when I just went to work at Holmes. He told me what had happened and that he wasn't living there any more; that things got so disagreeable up there that he had to leave and that she wouldn't give him his property and he told me he was going to try to get his property back, and if I knew anything in that line when I was living there would I come down and help him out. I said I would. I knew Mr. James Springman. He was a caller at the house, 1713 7th Street, N. W. He would come once a week some weeks, then sometimes he wouldn't come for two weeks. He went to see the family generally, I think. But my sister told me at one time that after her husband's death she didn't have anybody to advise her in regard to business, and that Mr. Springman was her advisor in business matters. Only at one time I heard Mr. Stahl say that he didn't want her (Mrs. Stahl) to be associating with him, and coming to the house. He
60 was jealous of Mr. Springman. Mrs. Stahl was present at the time; all were in the kitchen together.

On cross-examination the witness testified as follows:

I judge Mr. Springman was 60 years old. If he was 70 he held his age pretty good. He was a pretty active man at that time. I knew Mr. Springman before Mrs. Stahl came to live there; long before that, because Uncle Tom was an old acquaintance of his and he used to come up there then. Mr. Springman had been coming to see Uncle Tom since I had been living there, but not so frequently as he did later. Mr. Springman would come there probably once in three or four months. He was an old life-long friend of Uncle Tom and used to come and see Uncle Tom and his wife. After Mrs. Killigan's death, Mr. Springman continued to come there. Mr. Springman wasn't present on the occasion mentioned when Mr. Stahl said he didn't want his wife to associate with this man. I was there, her husband was there and John was there. When Mr. Stahl made that remark she flew off the handle as she always did. They had a big argument about Mr. Springman because she was going down to see him and he was jealous of Springman, and told her to stay away from there. She said she didn't have anybody to give her any advice, and Mr. Springman was the only one she could go to for advice. That was the substance of what took place. I am not on good terms with my sister. The trouble was partly because the meals were poor and then the business disagreement we had in regard to the store. I don't know that my sister fed me and kept me for months when I didn't have a dollar in the world. I don't remember a time when I didn't have a dollar in the world. I got my money from my father's estate. I
61 got that money about four or five months after I attained the age of 21 years—about three years ago. Before I attained the age of 21, I left her house and I went to board at 1004 6th street, and I got my money after that. I was working all the time. I got my money after I attained the age of 21 years. I was married after I got the money. When I met my uncle in the

park about six months ago he asked me if I wouldn't help him out. He said she had treated him mean. She wouldn't give him his property. He stated the case to me fully and asked at any time was I willing to go down there and say what I had to say. I told him, yes. I didn't say in my direct examination that my uncle asked me if I would help him out and I said I would. If upon my direct examination it is on the pa-er that my uncle, when he met me in the part about six months ago, asked me to come down and help him out and I said I would, then I said it. I knew when I would be helping him out I would be doing my sister injury. I would rather take the part of my uncle instead of my own sister. That is the kind of feeling I have toward my own sister. About the time this deed was made I was living at the house, and I know he was drunk the whole month. I heard about it (the deed) afterwards. I know he drank from a year and half after Aunt Mary's death. He never got off of it. I am willing to go on record that he was continually under the influence of liquor for a year and half; about that time. His wife died in 1908 to my knowledge. He worked for about six or seven month after she died. After that he had no employment that I know of. I would have known it if he had had employment. I was living there at the time. About a year ago and about six months ago I have had close connection with him. Outside of that I have had no connection with him at all. I left the house on

62 7th Street about four months after Mr. Stahl died, as near as I can recall. I have never been there since. (Counsel agreed that Mr. Stahl died February 13, 1910.) Four months after Mr. Stahl's death I never went around there at all. Since I left the 7th Street house I could not tell you as to Mr. Killigan's sobriety. On the two occasions when I met him, the first about a year ago and the second about six months ago, he was sober. He was working the first time I met him. Within the last two or three years, except on those two occasions, I passed him once or twice on the street, but I never stopped to speak to him. I don't think he was drunk. It is a pretty hard question to tell you the last time I saw him drinking. I couldn't tell you just now. As near as I can remember it he was before I left the house—about three years ago. To the best of my knowledge he hasn't been drinking since. When I was at the house I didn't like the food my sister gave me. I suppose she gave me the same food she had herself, but not in the same condition. If you had a meal cooked at five or half-past five in the evening, do you think the meat would be hot and in the same condition at 7 o'clock or half-past seven? I accom-odated her by minding her store. I didn't finish my work until 7 o'clock and couldn't get home until half-past seven. In other words, I wanted the meat cooked all over again at half-past seven. She had been doing it previously, but she just got tired, I suppose. My sister was not at her little cigar store at 702 Fla. Avenue 16 hours a day for this reason: I opened the store at five o'clock in the morning and then I went to work at seven o'clock, and every other night I minded the store from seven o'clock until

twelve. My brother-in-law minded the store the other nights. I guess my sister spent most of her days up there trying to make a living for herself. I had an interest in the store.

My sister disputed that and we had a quarrel about it. She transacted the whole business. The transaction was like this. When she made the last transaction to buy this store, she said to me, "there is a nice little business for us here if I take \$200.00 of your money and put the rest of my money in that and get married again, you will have a nice living to make. For your services up there I will give you your board and your room and your cigarettes for helping me out." At that time I was not to receive any money out of the business any more than my board and room and she was to give me a half interest in the business when I attained age.

Q. "The question is did you ever put one dollar of your money in the business—you or Mr. Quinn, did you? A. No more than what she told me that she would do—draw the money out of the Court and put it in there. I didn't have a thing to do with it because she was my guardian. I had to take what she gave me. She didn't pay me a little more than I was entitled to. I don't think I told my sister when *when* she as guardian settled her account with me that I did not think there was so much coming to me.

64

Testimony on Behalf of Defendant.

MARY A. SULLIVAN, on oath, testified as follows:

My present name is Mary A. Sullivan. At once time my name was Mary A. Stahl. I was married to my present husband January 3, 1912. My first husband, Mr. Stahl, died in February 13, 1910. Mr. Thomas J. Killigan, the plaintiff in this suit, is the husband of my deceased aunt. I am not related to Mr. Killigan by blood. Am only related to him by marriage. I understand what this suit is about—It is to set aside a certain conveyance that Mr. Killigan made to me covering the property on Seventh Street where I now live.

When my aunt, Mrs. Killigan, was taken sick, she asked me to come up to the house, and I went up there and found her ill. I was then living on First Street in my own home. She was ill and I had gone back and forth to my house from her house night and morning, attending to both houses until she became so ill. Mr. Killigan was present. She said, Ada, I think you had better come here and stay with me until I get well, I said, all right, Aunt Mary, what will I do with my house. She said, shut up your house, and I said, all right and I came. Q. By Mr. Brown: "Do you mean to say that Mr. Killigan was present all the time that this conversation took place?" A. "Yes, I went down stairs and I told him, and his wife had also talked to him about it". By Mr. Brown: "Object to all that testimony". Br. Mr. Colbert: "I agree that everything said by this witness outside of when Mr. Killigan was present should go out. My aunt died June 24th, 1908. At the time of her death I was living at her house—Uncle Tom's house. That is the house in controversy. I had been living there for three months before

her death. I became a part of that household at the invitation of my uncle, Mr. Killigan, who asked me to come there after the funeral of my aunt. After the funeral it was supposed I would go to my own home. After the funeral I was very ill and the next day I said, Uncle Tom, I guess I will go home now. He said, go where, to First Street? I said, yes. He said and leave me? I

65 said, Uncle Tom, I have no business here. And he said, well, who is going to take care of me, and I said, why you have two sisters, and he said, but I don't want them, and I said well, they will want to come here, anyway. He said, No, I don't want them to come here; I want you to stay here. I said, what am I going to do with my house? He said sell it or rent it. At that time my husband, my child, my cousin and I were living in the First Street house. My counsin is Mrs. Davies—she was then Miss Crimmins. After the funeral of my aunt I didn't close up my First Street house. I think that I left the furniture and everything in there closed up fully a month before I disposed of or rented the house, because I felt that his sisters were next to him, and they might want to come there and keep house for him, and I would rather keep my own house. I guess it was about a month after my aunt's death that I actually moved into Mr. Killigan's house. I was present at my aunt's funeral. After the funeral was over I still remained at 1713 Seventh Street. Slept there at nights, and continued to stay there. My husband and son were all there together. About a month after the funeral of my aunt, I just locked my house, and the furniture was all in it, and I kept it there a month before I disposed of the furniture. During that month we lived in the Seventh Street house, my husband and I slept there. I had actually been living in the Seventh Street house for three months before my aunt died. At the time of the death of Mr. Killigan's wife he had been drinking. He didn't drink hard, but he drank on and off while she was ill. He would stop a day, I suppose. He said he was worried, and just took a drink to drown his trouble, After my aunt died he drank occasionally, on and off, like he had always when my aunt
66 lived—he would stop and go on again, and stop and go on again. After my aunt's death, he didn't do anything—only there in the store. He took in no work. He had a stock there in the store. He took in no further orders. I took them in and he never attended to them, If I can recall, it was almost a year after my aunt's death before he actually disposed of the stock in the store.

Q. Now coming down to the following spring, which would be the spring of 1909, or the month of March, how did it happen that he executed this deed to you? A. At first he made a will. Q. Did he tell you about it? A. Yes, and he said he was going to make a will. I said, what for? He said, I don't know how long I might live. I said, well, Uncle Tom, if you feel disposed that way, all right. He said, I want to send for Jimmie Archer. Q. At that time did you know Mr. Archer. A. I knew him just as I know any other person. Of course, I had some business that I had in my affairs.

Q. Did you suggest Mr. Archer? A. No, Mr. Springman suggested him.

Mr. Springman was a lifelong friend of Uncle Tom's and Aunt Mary's. He was no particular friend of mine. He was the man who used to be deputy United States Marshal at the Court House. Q. It has been suggested here by somebody that Mr. Springman was altogether too friendly with you. Is there any truth in that statement? A. Not as I know of. He has always acted to me as a gentleman, and I as a lady.

After Mr. Killigan suggested that he was going to make a will, Mr. Archer came, and he made it. I had noth^{ing} to do with the making of that will. Mr. Archer came up to the house that night, and Mr. Springman brought him with him, and Mr. Sprinman told him that Uncle Tom had told him that he wanted to make his will, that he didn't know what day he was going to die. The will was written in Mr. Archer's office, and
67 witnessed in the Seventh Street House. The witnesses were Mr. Umhau, a plumber across the street, and Dr. Roman, Mr. Springment and Mr. Archer. The will was made about six months after my aunt died. After the will had been signed and witnessed, Mr. Archer in the presence of Mr. Killigan, and the others, handed the will to me. Q. How did Mr. Archer happen to give you that will to keep. A. I think he had a copy, and he said here was another copy. I think he said I have the original copy, and here is another copy. I read the contents of that will.

Mr. COLBERT: Of course, I am a little embarrassed, Mr. Brown, by not having the will here, and I have to refer to its contents without having it.

Mr. BROWN: All right, go on. Q. Did Mr. Killigan make any statement as to why he didn't make any provision or better provisions for his sisters? A. Why, he said he had no use for them, and of course, I just won't use the expression he used, because it would—— Q. Well, it will be necessary for you to tell us what he said. A. He said, the Hell with them, they aren't a damn bit of good; I wouldn't give them a chair to sit on. Continuing, the witness testified as follows: During the three months prior to my aunt's death, Mr. Killigan's sisters never came to his house the whole time until I went down there personally myself, and asked them to come. My personal relations with Mr. Killigan's two sisters had been very friendly. After that will was made, I think, as far as I can recall, it was five or six months, or it might have been eight months, that the deed was made to me.

Q. Will you please state in your own way just how that deed came to be executed? A. Why, Uncle Tom said to me one day—

I said, Uncle Tom, I am awfully afraid that your sisters
68 some day are going to give me trouble. He said, what do you mean, Ada? I said, Uncle Tom, they are your sisters, and I am only a niece to you by marriage, it is natural that they will feel nearer to you, and would want what you have. And he said, you oughtn't worry about that. I said, I would rather not have anything

if I had to have trouble over it. He said, I am going to deed that property to you, and then they won't give you any trouble. And I said, how can't they give me trouble? He said, no, a deed can't be broken. When I once deed it to you it will not be broken. Q. Was he sober at that time? A. Yes, sir, he was sober at that time, and I said, Uncle Tom, that is all very well, but I said, tell you the truth, I would rather not have it if I had to have trouble over it. He said, Ada, you are the only one that has stuck by me, and if I had twice as much you should have it. You are entitled to what I have, and if I had twice as much, I would give it to you. And if my husband was living he would be a witness, but he is dead and can't speak for himself. I recognize Mr. Killigan's will, dated October 12, 1908, which is now shown me. Yes, sir, that is his signature written in a firm hand. This will was witnessed by Dr. Frederick Roman and C. F. Umhau, the plumber across the street, Mr. Springman, who is named as executor in this will, was present. The will was made about four months after my aunt's death, and the deed made four months later than that. The deed from Mr. Killigan to me, which is now shown me (Plaintiff's Exhibit No. 2) was signed by Mr. Killigan. I was present. I know Mr. Lawrence Hufty, the Notary public, who appears to have taken the acknowledgement, but did not know him before this deed was signed. It was the first time I ever saw Mr. Hufty. I think Mr. Archer sent for Mr. Hufty.

69 Mr. Archer prepared the deed, at the request of Uncle Tom. Uncle Tom had talked to me about deeding the house to me on two or three occasions, and I said, some day when you want to, and you feel like going, I will go with you to Mr. Archer's office. And he said, I want you to go with me. I think it was on a Monday, he said, I want you to go down town with me today to Mr. Archer's office, I am going to change that will, and deed that house to you. Have you got any money? He will want to be paid. I said, Well, I have got a little, Uncle Tom. Do you know how much he is going to charge? He said, No, I don't know. I had ten dollars in my pocket, and I said I will take that along anyway. We both went on the car together to Mr. Archer's office, at which time Mr. Killigan was in his sober senses. I heard the instructions he gave to Mr. Archer. I was there. He said Mr. Archer, I want to deed my property over to my niece, Mrs. Stahl. That was all he said. Mr. Archer said, Do you want me to draw up the deed now? He said, Yes, He said all right, I will draw it up, and I will send a notary public to your house for you to sign it. I did not suggest who the notary should be. Mr. Archer selected the notary. I think the next morning, or the morning after that, the notary came to the Seventh Street house. Q. What was Mr. Killigan's condition as to sobriety when he signed that deed? A. Well, Uncle Tom had a habit of getting up in the morning, and going out early, and when Mr. Hufty came to the house Uncle Tom was out. I said, Mr. Hufty, Uncle Tom isn't here now. He said, what time will he be in? I said, he generally comes back and eats his breakfast about ten or eleven. He said, probably I will catch him then. He came back,

70 and Uncle Tom had eaten his breakfast and laid down on the lounge when Mr. Hufty came in. I woke Uncle Tom up and told him there was the notary public to witness the deed. He signed it. He was sober when he signed it. He was lying down and he had a nap. I never told Mr. Killigan on that occasion, or any other occasion that I would simply hold this property in trust for him. No sir, I had never said anything like hold-in-trust, or anything. Q. "What promises did you hold out to him, or make to him in connection with the signing of that deed"? He said, Ada, I know you will always take care of me, and I said, Uncle Tom, I would take care of you whether you had nothing, because Aunt Mary before she died, had asked me to take care of him; and I said, whether you had anything, or not, I would do it just the same. He said, I know you will always take care of me, and I will have a home. I never on that occasion, or any other occasion, said that I would deed this property back to him when he wanted it. I think the deed was recorded soon after it was made—I just don't know the date. "The deed appears to be dated the 30th day of March and recorded the 31st of March. Acknowledged the 31st, the day after it was dated. Who paid Mr. Archer for his services in writing this instrument? I paid Mr. Archer for his services in writing the deed. I think it was seven dollars. I don't know if he (Mr. Archer) paid for recording the papers. Mr. Archer took the deed over to the Recorder of Deeds Office. After this deed was signed, just about four years ago, Mr. Killigan continued to remain in that house, living there until June of 1912.

71 When the deed was signed I had occasion to go — the Oriental Building Association to renew or to replace the first trust on the house. Mr. Killigan had borrowed \$1,600.00 from the Oriental on the house before he gave it to me. Under your (meaning Mr. M. J. Colbert, counsel examining witness) advice, in order to make the payments smaller for me I took a three year loan in the German-American Association, but I paid up the interest in the Oriental before I took the loan in the German-American. No one went with me to the German-American Association but myself. Mr. Killigan didn't go. I signed the deed of trust for the three year loan. When Mr. Killigan left the house we never had a word. A customer of mine came in my store and asked Uncle Tom to cash a check for him. Mr. Killigan told me about the incident. The customer was a very good customer and asked Uncle Tom to cash a check. He said he didn't think I liked to cash checks, and I said, Uncle Tom, you know that he is offended at it and he is trading somewhere else, and I have lost his trade over that check. Uncle Tom says, Oh well, I don't care anything about his trade, and I told him I had a living to make, and that is all the words we had. He left my house, and that is all the words we had, is over that customer. Following the incident referred to, he went down home to get his breakfast. He always ate a late breakfast, and I don't recall whether he ate his breakfast or left it there, but he put on his best clothes and went out. He never came home that night and he never came home the next night, and I always wondered

and worried where he was when he was out, and he stayed away two nights, and the third night I said I am going to look for him. I didn't go myself, but I sent a neighbor of mine down to his sisters.

72 That neighbor was Mrs. Spencer. I think it was three weeks afterwards he came up to the store one day and walked right into the store, and I asked him where he had been. First he said knocking around, and I said, knocking around, where are you knocking around? You have got to have some place to stay. You have been down to your sister's, haven't you? He said, well, yes, like he didn't care to answer me. You know, Uncle Tom, I said, if you are satisfied down there, alright, and I want you to understand that I have always tried to do what I could for you. He said, yes, Ada, I know you have, and I am sorry. He said, I have done what I done. Will you give me 50 cents, and I gave him 50 cents. I said Uncle Tom, your hat's all broke. Get up there in the chair and let the colored boy shine your shoes. He said, yes, I need a new hat, and if I had the money I would get one. I told him to go around to Miss Brown's and get one and tell her I will pay her and he went and got the hat and put in on his head, and brought the old one to me. I said, are you going home to-night? He said, yes, I am going down home. I am going to take a nap. I asked him if he had his key to get in and he said he still had his key. I said, alright. Your home is there any time you want it. I have never turned you out. Of course it is hard for me to take care of the house and do the cooking and manage this store, but we have always got along. He said, yes, Ada, we have always got along very well. We couldn't have got along any better. Uncle Tom and I never did have cross words to this day. Since my Aunt died in 1908 Mr. Killigan has had no employment, only at my store. I had some little fortune of my own that I got from my grandfather's estate. I put that in the First Street house. I bought that house out of the Building Association. When Aunt Mary died I think it was a year or

73 so that I sold that house and only got just what I paid for it, \$3,600. I bought this store at 702 Florida Avenue out of the money I got from Mr. Stahl's insurance. I paid \$400.00 for it. I have been running that store and making my living out of it ever since. When I first took it I had no one to help. I would open up at five-o'clock in the morning and stay there until one the next morning, for the simple reason the place was run down and I thought it was a good plan and it was a living there. At that time Mr. Killigan didn't help me at the store. About four or five months I commenced to get sick, and I said to Uncle Tom, you are sitting here all day doing nothing, why don't you come up to the store and sit up there and you will learn the trade, and stock and prices, and you would be lots of help to me in the store. Alright, he said, if you want me I will go up. He came up to the store and after he had learned the stock, the prices and the people, he said, how about my opening up every morning and staying until 10 or 11-o'clock in the day. That will give you a chance to do the house work and give me plenty of time during the day to do what I please. I never paid him any wages. I

offered him money, and gave him money at any time he asked me. At two or three times he got mad. I didn't know what for. I said, Uncle Tom, do you want me to pay you for staying up here. He said, what are you talking about. What more could I want. I supplied him with pocket change. Of course, you know, I couldn't supply him with a whole lot of change. I furnished my own table at the house and bought the food, I had an old white woman there at first to take care of the house while I was away. He (Uncle Tom) was furnished with the proper food at the 7th Street house, because I went to the market and bought it myself.

74 He had the same food that I had. It wasn't always convenient for me to leave the store and eat at the same table with him, but I had the stuff and the woman there to cook it. It was good, whole-some food, as much as he was ever used to. I never urged upon Mr. Killigan or attempted to persuade him to make a deed to this house to me. He said of his own accord, "I am going to deed to you that house so my sisters will not make trouble for you". Q. Did you ever agree as a consideration for that deed that you would give him a home in that house as long as he lived? A. I always said I would take care of him as long as I lived or as long as he lived. Q. Did you always do that. A. Yes. Q. After June of last year when he left this joint home of yours, did he ever come back? A. Yes, sir, he has been back. Q. Since this suit was filed? A. Yes, sir, and I have given him money since this suit was filed. Q. How often? A. Two or three times. He slept there one night; that was after last Christmas. Q. Did he make any reference to the fact that he had brought suit against you. A. Yes, sir. He called me out in the hall, and we were all going to eat supper—He said, I don't want any supper, Ada. I said, come on it is no use for you to act stubborn. He said, give me a quarter. I said, now listen, if I give you a quarter, you will only go and get something to drink with it. Come on, get your supper, and then go. He said, no give me a quarter. I will come right back and eat my supper and go to bed. My sister, Margaret, and Mr. Sullivan, all of them were sitting at the table and heard me. Q. Did he make any reference to the suit? A. He said, Ada, you and I are having it, aren't we? I said, well, Uncle Tom, you started it, I did not. I said, what occasion did you have to start it? Oh, I don't know, he said, It is my sisters that put it in my head

75 to do this, and I said, well if it's through it is going to go through now, as long as you started it. He said, No, I am going down and withdraw it. I said, here in the quarter, and come back and eat your supper, and then he went down the steps. Q. "Did he come back"? He came back one evening up at the store. I wasn't there but my sister was there. He related the same story to her. I never represented to Mr. Killigan that I had arranged to have the deed in trust drawn up for this house on 7th Street. It was never understood to my knowledge that I would hold this property in trust for his benefit and give it back to him whenever he wanted it. Q. "What became of this original deed after it was withdrawn from the Recorder of Deed's office? Who kept

possession of it?" A. "I went down one day to see Mr. Archer and he said, did you get the deed? He said he was busy and told me to go over and get it and I got it. After I got the deed back Mr. Killigan saw it and knew what was contained in it. I will truthfully say that Uncle Tom had drunk off and on at times, but when that deed was prepared he was sober, but when the will was prepared he was drinking a little. I heard Mr. Killigan say that before his wife's death he never intended to do any more work. He said he had worked hard enough in his time and he was going to take it easy; that *the* would live in the house and that I would provide all that was needful. He said he didn't intend to work any more, so I suppose it was up to me to do the work. I don't know what his business is since he left my house. He never any statement to the effect that I should convey the property back to him or execute a declaration of trust or some paper assuring to him that the property was held by me in trust solely for his benefit. After he deeded the property to me he never said anything about it. He never wrote me or asked me to give him a deed back for the house.

76 He never gave me any intimation, verbally or written, that he was going to file this suit against me. The filing of the suit came as a surprise to me. I never told him that I would hold the property in trust for his benefit and convey it as he might direct, nor did I understand anything to the effect that it would be better for him that the same should be held in my name. I didn't understand any thing to that effect at all. I came with Mr. Killigan time and time again to Mr. Colbert's office to settle Mrs. Killigan's accounts, but it never has been done. I never received the proceeds of any checks that he drew on the Riggs National Bank. I haven't got one of these checks. They are all at the Bank, I think. I don't think I have any bank book of his. Mr. Killigan called at my house after this suit was filed and demanded that I give him certain papers. Another man was with him. He was a stranger to me. He didn't appear to be a lawyer. If he was, he certainly was a poor looking one. This one looked as if he didn't have sense enough to go across the street. I don't know his name. On that occasion he (Killigan) said that he had come to get Aunt Mary's bank book. I told him I would look for it when I went down to the house at supper time. The interview was had at my store. He asked me if I could go down then. I told him I couldn't leave the store, as I had nobody there. I then said that when I went down to supper I would look for them and if they were there for him to come back and I would give them to him. He came back about 7-o'clock, and I went to the door. I told him I had looked but I didn't have anything that looked like a bank book or anything related to it.

Upon cross'examination the witness testified as follows:

It was Mr. Killigan's sister Kate who stayed at the house during Mrs. Killigan's last illness. She would come up every other night

and let me rest, but she never stayed at the house constantly.

77 She would only come up in the night and let me rest every other night. She would stay there at nights every other night. She would stay there every other night and relieve me. That was two weeks before my aunt died. My aunt was sick three months. I am testifying from my memory. I had it all day and part of the evenings, besides the cooking to do and nurse her. I don't know whether Miss Killigan had any boarders or not. I think she had her household duties to attend to. She had roomers in the house. She went back to attend to her business in the morning. I lived on Rhode Island Avenue for almost two years. I moved from First Street to my uncle's house on 7th Street. I lived on First Street for about a year, and previous to that I lived on Rhode Island Avenue. I moved from Rhode Island Avenue to First Street. I bought the First Street property and lived there almost a year when my aunt was taken sick. The back of my house on Rhode Island Avenue was just opposite the back of Mr. Killigan's house. That is to say, across a 16 foot alley. I could go from my back yard into his back yard. Then I bought the First Street property and I lived there almost a year when my aunt was taken sick. After her death I kept the house for a month or two, then disposed of my furniture by storing it, and rented the property and afterwards sold it. I stored my furniture in the rear of the First Street house. There were two houses on the lot. I sold both houses. I gave some of my furniture to my sister and brought some of it to Mr. Killigan's. I brought the best of my things, the side board, dining room chairs, a couple of rocking chairs and a bed room set. The rest of the furniture my sister kept. The rest of the furniture was a parlor set that

78 I had no use for at the 7th Street house, because there was enough furniture in the house. The furniture that I brought to the 7th Street house is still there. My piano is still there. All the furniture that was in Mr. Killigan's house when Mrs. Killigan was living is still there; most of it is. Some of my furniture that was in the First Street house I sold to my sister. At first, I told her she could keep it until some day I may need it. A year or so afterwards she said she would buy it from me as she had used it so much. It was my dining room chairs. I have two sets of dining room chairs. One set I brought to the 7th Street house and the other set I afterwards sold to her and my parlor set. I had more than one bed room set. I had a bed room set in the spare room. The other set I left there. I can get them any day I want them. I didn't sell any property to any out-sider; not to my recollection. I kept my dining room table until about a year ago when I exchanged it for a round table. This is still in the 7th Street house. It is mine. I took my furniture to the 7th Street house when I broke up house. I afterwards sold the entire First Street property. When I sold the property I had to empty the house. I had to take the furniture in the rear of the First Street house. That was a year or so after her death or maybe before. I have all the papers at home about the transfer. I would have brought them here if I thought they were needed. Mr. Killigan told me that he was worried and

took a drink to drown his troubles. He told me so on several occasions. Before I went to see Mr. Archer about the deed he had attended to some other business for me. I can't just state the time. It was my own private business. I had seen him no more than once or twice. It was about my own affairs. I think it was a good while before March 1909. It was about a year or may be more.

79 I happened to know Mr. Archer. I happened to go to see him through Mr. Springman in reference to my own private business. I didn't do anything with the will which Mr. Archer gave me, after it was executed by Mr. Killigan, except to put it away with a whole lot of other papers that I had of mine. I identify the will shown me. It looks like the will I put away. When he executed the will he was drinking but drinking a little, but he knew what he was doing perfectly. When he made the deed he wasn't drinking. Mr. Killigan's signature to the will is the way he signs all of them in my recollection, in a firm hand. I have some bills home that he signed in the same way. His signature to the deed is the way they are all signed. The signature to the will and the signature to the deed both look the same to me. Of course, there is a little difference. They are about the same. The word "Killigan" is written the best in Defendant's Exhibit No. 1." I notice that the signature to the will is written on the line and the signature to the deed is not on the line. Anybody can see that. The signature on the will is straight across the paper, and the signature on the deed is a slanted position. I cannot account for that at all. I only knew Mr. Lawrence Hufty when he came to the house to witness the signature. I don't remember that I was present in Mr. Archer's office when Mr. Hufty had a conversation with him. I don't think I saw him at that time. I cannot testify about it, positively. I think I read the will over when it came into my possession. I kept the will with my other papers in a bureau drawer. I have no safe. It wasn't locked up. I never kept anything locked up. I kept it like you would keep any ordinary papers. I suppose they were altogether. If they were all in one drawer they would have to be all together. I am not

80 that kind of a person that keeps things scattered. They may have been in different piles but they were all together. The bureau was in my bed room. I kept it (the deed) after I got it in the same drawer with the will and with all my other papers. Prior to making the will, Mr. Killigan had assigned some policies of insurance to me. That was done almost two years after my aunt's death. The insurance wasn't mentioned in the will. He assigned the insurance to me prior to making the will. I think the policy was assigned before my aunt's body was taken out of the house, so far as my recollection can go. I had so much at the time to think of. The policy was made out in her favor. She died and of course, somebody had to be made beneficiary. When he went to borrow money on his insurance I went with him. That was before the body was taken out of the house. I think it was that day, although I am not sure, that he put the policy in my name. I will not say positively, but I am almost sure. I went with him and he

borrowed \$500.00 on the policy which was either \$5,000.00 or \$2,000.00. I know it was over \$1,000.00. He borrowed \$500.00 on it. It must have been that he borrowed this money before he put it in my name. The insurance people have that policy. He put it in my name when he borrowed \$500.00. The insurance has been dropped. I could not pay the interest on that \$500.00 and the insurance for two years at \$100. per year. I couldn't pay it up. On the day he executed the deed, I couldn't remember that he had been out in the morning. The night before we were out driving together. We had an old habit of going to the cemetery driving on Sunday. When Mr. Hufty first came there it was early in the morning and Mr. Killigan was out. Two or three times Mr. Killigan got mad, but I don't remember when it was or what it was for. But any man is liable to get cranky spells on. It would only be for a short
81 time then it would be all over. He would never say anything to me. He would never treat me any ways different when he was. He would always treat me the same. When he got mad he would not have much to say, you know. Whenever I would talk to him, or anybody would talk to him, he was always very talkative and agreeable. He would say he wasn't feeling well. If I asked him if he felt badly, he would say, Oh, no, like he didn't want to talk. That is all; we never had any words. He never got mad very often. As I have said, he might have got out of humor. I knew he was mad because he would have nothing to say, that's all. He was always very talkative. He would never say what he was mad for. I don't know what those occasions were. He lived with me for five years, and it is right hard to remember all the occasions on all these five years.

Whereupon JAMES B. ARCHER testified as follows:

I am an attorney and have been a member of this bar for 14 or 15 years.

At this point the witness was asked if he was acquainted with Mr. Thomas J. Killigan, and thereupon Mr. Brown, counsel for the plaintiff, objected to the giving of any testimony of the witness if it was claimed by counsel for the defendant that he was the attorney for Mr. Thomas J. Killigan in any transaction involved in this suit, upon the ground that if the witness testified that he ever was counsel for Mr. Killigan in any other matter, the testimony would be irrelevant, and on the ground that if the witness testified or claimed that he was attorney for Mrs. Sullivan, objection is made unless Mrs. Sullivan waived her privilege. The objection is, that the testimony he might give in reference to any matter would be privileged communication between attorney and client and on that ground objectionable.

82 Thereupon, Mr. Colbert, attorney for Mrs. Sullivan, stated that Mrs. Sullivan was present in the room where the examination was being conducted, and on her behalf he waived any privilege that she might have. With reference to the other branch of the objection, counsel for Mrs. Sullivan stated quoting from page 29

of the typewritten testimony containing Mr. Killigan's evidence in which Mr. Killigan stated definitely that he never employed Mr. Archer in the matter of the preparation of this deed and never paid him for it, and thereupon asked counsel for Mr. Killigan if he claimed that Mr. Archer was acting as attorney for Mr. Killigan in this transaction.

Thereupon Mr. Brown, counsel for Mr. Killigan, stated "that he claimed that Mr. Killigan never employed Mr. Archer and he never was Mr. Killigan's counsel." But Mr. Brown stated that before the witness could testify, it must be conceded as a matter of evidence that Mr. Archer was not the attorney for Mr. Killigan and that objection is made unless that concession is made. Thereupon, counsel for Mrs. Sullivan stated to Mr. Archer, quoting from the testimony of Mr. Killigan, that Mr. Killigan said he never employed Mr. Archer to prepare the deed, and quoting the following language: "Did you give Mr. Archer any instructions about preparing this deed? A. No, sir; I did not engage Mr. Archer to prepare this deed. Q. Didn't he send you a bill? A. No, sir. Q. Didn't he bring suit against you? A. Not for that service, no, sir. Q. For what service was it? A. For a former service."

Mr. BROWN: This witness says she paid Mr. Archer.

Mr. COLBERT: If she did, she waives her privilege.

Mr. COLBERT, addressing the witness: Mr. Archer, will you please look at the paper which I hand you, which has already been offered in evidence and marked Plaintiff's Exhibit No. 2, and state in whose handwriting the manuscript portion of that instrument is? Objection was made to this question that it was a privileged communication unless it was put into the record that Mr. Archer was not the attorney for Mr. Killigan.

Mr. COLBERT: I would like to state for the benefit of the Court, how can I tell whose attorney Mr. Archer was. I am not Mr. Archer's attorney. He is merely a witness, and I leave it to Mr. Archer's own sense of propriety.

The WITNESS: I desire to state on the record that I was employed by and acted for Mr. Killigan in this transaction, and in the face of this claim of privilege, I decline to answer any question in reference to the transaction unless directed to do so by the Court.

Mr. COLBERT: That ends the matter so far as I am concerned. Were you in this transaction employed by Mrs. Sullivan, formerly Mrs. Stahl? I never was employed by her in any transaction in my life. Q. That relieves you from the necessity of disclosing any confidential information given you by Mr. Killigan whom you say was your client, unless these gentlemen on the other side choose to waive it, so therefore I omit altogether any reference to any privileged communications made to you by Mr. Killigan. I ask you, apart from that question of privilege, whether that paper is in your handwriting. Mr. Brown: "Objected to". A. If counsel claims that is privileged, I decline to say. The WITNESS: I said on the record that I am perfectly willing to answer this or any other question, but I am not able to decide as matter of law whether that is a privileged matter and I decline to answer. Q. I will ask you

at the time that deed was prepared and altogether apart from any communication made to you by the gentleman whom you say was your client, although he repudiates the relation, if you observed

84 Mr. Killigan and saw him on that occasion preceeding the date of the preparation of this paper. Mr. BROWN: Objected to on the same ground of privilege. A. I never saw Mr. Killigan except when I was communicating with him as his lawyer. Therefore, I decline to answer any question relative to him. Q. I ask you to state at the time that deed was dated on the 30th day of March, 1909, when you met Mr. Killigan in this professional relation whether he was in possession of his senses, that is to say, was he drunk or sober? Mr. BROWN: Objected to, on the same ground of privilege. A. Every time I saw Mr. Killigan before the completion of this transaction I was acting as his attorney, and if the privilege is claimed I feel obliged to respect it until further directed by the Court. Q. What instructions, if any, did you receive from Mrs. Stahl, now Mrs. Sullivan, as to the preparation of this deed. A. None whatever. Q. Did Mr. Sullivan, we will call her for short, without repeating the former designation, by word or act influence you in the preparation of this deed? Mr. BROWN: Objected to as leading and objected to on the ground that it had already appeared that she had been to see Mr. Archer and objected to on the ground that it is an attempt to contradict his own witness. I object, also, on the other ground.

Mr. COLBERT: It is an attempt to do nothing of the sort, for the purposes of the record. Q. What suggestion, if any, did Mrs. Sullivan make to you by word or act for the preparation of this instrument? Mr. BROWN: Objected to as leading and also on the other grounds. A. None, whatever. Q. Who, if any person, paid you for your services in this regard. A. Nobody paid me. The witness continuing: I have no recollection as to who placed the instrument on record. I know Mr. Lawrence Hufty and knew him in 1909. The witness declined to state at whose direction 85 Mr. Hufty took the acknowledgment to this instrument because objection was made.

Mr. COLBERT: I believe it is conceded on all hands that you (Mr. Archer) were not present when this deed was actually signed?

Mr. BROWN: I don't concede anything. The testimony speaks for itself. The witness declined to answer this question on Mr. Brown's objection. Thereupon the Examiner was requested by Mr. Colbert to certify this question of privilege to the Court.

Thereupon JOHN LEWIS SHITH testified as follows:

I am a lawyer by profession and am one of the Assistant United States Attorneys for the District, and am associated in business with Mr. James B. Archer. I know his handwriting, and have been associated with him for 10 or 15 years. The manuscript portion of Plaintiff's Exhibit No. 2, being the deed in controversy, is in the handwriting of Mr. James B. Archer.

Thereupon, upon the 27th day of March, 1913, the Commissioner, pursuant to the request of counsel for the defendant, Mrs.

Sullivan, certified and filed all the testimony thus far adduced, on the part of the defendant, and questions of law as to the testimony of James B. Archer to the Court for consideration and determination. Thereupon, the Court made the order contained in the transcript of record on appeal. Thereupon the taking of testimony was resumed and

FREDERICK O. ROMAN, who was called as a witness testified as follows:

I am a physician and have my office at 1337 R Street, Northwest, Washington, D. C. I have been practicing medicine 19 years and am acquainted with Mr. Killigan. I have known him 15 years
86 and have been his attending physician from the first time I met him 15 years ago. I was his physician for 12 years.

I saw him probably every month or so. I attended him. I thought I was his doctor. I attended him whenever he was taken sick. Probably twice a year or something of that kind. (Upon objection by Mr. Killigan's counsel, the objection being that the evidence relative to the will is immaterial to the issue involved in this case, this case being for the purpose of setting aside an alleged deed to this property, but that will isn't involved in that issue, the witness stated that he identified his signature to the will.) I signed my name to this paper at Mr. Killigan's home. Mr. Killigan called me to his home to witness the paper. At that time he wasn't under my professional care. I came there in the evening to witness this document. At the time I signed the paper Mr. Killigan was not under my professional care. At the moment of signing the paper I wasn't acting in my professional capacity as his medical adviser. Mr. Killigan called me to witness the document over the telephone. I was called there after 8-o'clock, in the evening. I went into his sitting room back of the store, and they told me he wanted me to witness a will that had been drawn up. There were several others there. There was the lawyer who drew the will. I knew, but can't recall his name now. Q. Would it refresh your memory if I should suggest the name of Mr. James B. Archer. A. Yes, I recall it now. Mr. Springman was there. I signed my name as a witness stayed there a short while, and conversed with those present and then left. Mrs. Stahl was there but nobody else that I recall. On that occasion, Mr. Killigan wasn't sick to my knowledge. He seemed sober so far as I could see. I didn't read the will. Mr. Killigan made no statement to me as to its contents, and I never inquired.

On Cross-examination the witness testified as follows:

87 I am pretty sure they phoned to me. They had a 'phone in the house, I remember, then. Mr. Killigan wanted me to witness the will. He is the one that asked me to sign when I went there. I received a 'phone from the house to come over there. That is all I knew until I got there. Then I was asked to witness the will. I haven't any recollection now of remembering Mr. Killigan's voice. I cannot testify whether it was Mr. Killigan

who called me over the 'phone or some other person. When I got to the house I first saw Mr. Killigan. I walked through the store and opened the door into the dining room or sitting room and I met Mr. Killigan. He was generally the first one I met. I have a distinct recollection of this visit. I have a distinct recollection of Mr. Killigan, and nobody else met me when I went in. I knew all the other persons there except Springman, and I was introduced to him that night. We talked a while first. I don't recall that the person who called me over the 'phone said that they wanted me to come and witness the will. I don't remember whether I learned it after I got to the house. When I got there the first person who told me that they wanted me to witness a will was Mr. Killigan. I knew Mr. Archer before this meeting. Mr. Archer told me where to sign and he had the will. He was the lawyer in charge. He gave me directions where to sign. He said nothing more than to sign and to tell me where to sign. I am referring to the will. I stayed there about thirty minutes. I didn't observe that Mr. Killigan had been drinking. My recollection is clear as to that. I was called there to witness this will and he walked around and talked to me. I was as close as I am now, sitting right there with him. I wasn't close enough to observe whether liquor was on his breath or not. If he was drinking I didn't know it. I knew that he was a drinking man. I have attended him a number of
88 times when he has been drinking. I suppose a dozen of times prior to the execution of the will. I attended him since for intoxication. The first time I visited the house was for that, probably. I can't remember the last time I attended him prior to the execution of the will. I thought it was during the time his wife was living. She used to telephone me to come there and see him. He used to come to my office occasionally. When I attended him he was very much under the influence of liquor. It was easily a dozen times. I do not say it is more than that, but easily a dozen times. Q. "Mrs. Sullivan testified as follows in answer to a question by Mr. Colbert, her counsel: 'A. I think, and I will say truthfully, that Uncle Tom had drank on and off at times, but when that deed was prepared he was sober, but when that will was prepared he was drinking a little.' Now, in view of that testimony, do you still say that you didn't notice that he was under the influence of liquor at all that night?" A. By Dr. Roman: No, I didn't notice it if he was. I didn't go over there to see whether he was under the influence of liquor or not. If he had been under the influence of liquor I would have noticed it. I was in the house about a half-hour. I think Mrs. Sullivan was there the whole time. I don't know what was done with the will after it was executed. I left before the others. I met Mrs. Sullivan at the time. I have since then. I am not her regular physician. I have attended her once or twice, I guess.

Thereupon SELINA BROWN testified as follows:

I reside at 1900 7th Street, Northwest, at 7th and T. My husband is in the gent's furnishing business.—Shoes and department

store. I have lived in that neighborhood 20 years and have one child. I have known Mr. Killigan 19 or 20 years. He was in the 1700 block and I was in the 1900 block, about a block and a half away. I have bought all my cooking utensils from him. I have had business relations with him before his wife died. I knew him at the time of his wife's death and for some years before that and have known him since. In the last three years I met him every day. He bought through Mrs. Stahl's order. He came in and got his hats, shoes and underwear. He was in a few days before this past Christmas. Mrs. Stahl paid the bills. The goods were ordered by Mrs. Stahl through Mr. Killigan. Mrs. Stahl told us to give him anything he wanted. Mrs. Stahl came in with Mr. Killigan and told us to give him anything he wanted and she would pay the bills. During the period around March 30, 1909, I saw Mr. Killigan nearly every day. I have seen him under the influence of liquor and I have seen him sober. I have seen him looking very nice, and I have seen him looking very ugly under the influence of liquor. I cannot tell exactly how often I saw him under the influence of liquor, but he wasn't always under its influence. He was sometimes drunk and sometimes sober. From my observations, his relations with Mrs. Sullivan were very friendly. He was at the store a few days before Christmas to get a hat and a pair of shoes, and he had some change in his hands and said he was down to Ada's and look what she gave him. He said, she is the best friend I have. This was a few days before this last Christmas. He said, "I regret what I have done. I have been under bad influence." I said, "Uncle Tom, what made you do it? He said, I am sorry, Mrs. Brown. I have been under bad influence." Everybody called him Uncle Tom. I suppose Mrs. Stahl called him Uncle Tom. He is a quiet, well behaved person and has always been. When he said he regretted what had been done he referred to the present suit. He said he had taken Ada to Court about this house but he said he was sorry he had done it. He said he had bad influence. He was sitting in the dining room about an hour and was crying. He told me he was led by bad influence and said he wanted to go back to Ada. He said there is a young white woman who had his room, but that he still had the key and that he was going back to Ada. He said she was the best friend I have, she nursed my wife and she is my only friend. On that occasion, which was last Christmas (meaning Christmas 1912) he was very sober—because I asked him. I said, "Uncle Tom, I am proud to see you this way. He said, that he had been real good. He didn't exhibit any animosity towards Mrs. Sullivan, but he loved her, that she was the only friend he had and he was sorry for what he had done and he was going to try and recall it. What he meant to recall I don't know.

On cross-examination the witness testified as follows:

The change he had in his hand was a silver quarter and some cigars in his pocket. He stayed about an hour sitting in the dining room. He cried while he was there, and said he was sorry for what

he had done. He cried very hard and very pitifully. I have seen him often. I have seen him often under the influence of liquor. I never saw him cry before in my life. This was right before Christmas, a few days before,—about the 17th or 18th, or something like that. He wanted a new hat for Christmas, but I could not fit him with shoes. He said he wanted to go back to Ada's to live, but she had a white woman, a servant, and she had his room. He said he had the keys in his pocket and was going back. I know this white woman is a servant; a girl about 17 or 18 years old. I know she is a servant; I wanted her. I know she was the person he referred to when he said a young white woman had his room. (I had known Mr. Killigan 18 years, and in the last few years I saw him every day; almost every day. He would stop at the door, and then he used to attend to the little store around the corner. I used
91 to go around there and get little things from him at Mrs. Stahl's store. I used to go around to Mrs. Sullivan's house. I went to the store when his wife lived. I think I looked at a stove after his wife died. I didn't know Mrs. Stahl very well until in the last few years, only in business. I have never been in her house. She dealt with me for her uncle and her little boy. We don't keep ladies' things. Her first husband dealt with us, and if she dealt with us, I don't know her. I haven't been talking to her about this suit. I haven't seen her store three times. I was subpoenaed today. After her uncle was there Christmas, I told her what he had said. I begged her to take him back and she said that her house was opened to him. That is the only time I have seen Mrs. Stahl since Christmas—only once. I wasn't told that I was wanted to testify in this suit, and I was subpoenaed when the geneleman brought the summons—some paper. I was sleeping, and that was two o'clock, I mean twenty minutes after two this afternoon. I was so excited that I didn't know what the summons was. I haven't seen Mr. Colbert before this afternoon. I was served with a subpoena by a Deputy United States Marshal this afternoon after two o'clock. I told my husband that I didn't know what this could be, unless it was what I have told Mrs. Sullivan about Uncle Tom after the Christmas holidays. I said I would ask her if she and I could not go down together, and we came down together.

Thereupon THOMAS F. SWEENEY testified as follows:

I am a police officer and have been for 12 years. I have known Mr. Killigan about 15 years, and have known Mrs. Sullivan about the same time. I am connected with the Eighth Precinct Station
92 on U Street, between 9th and 10th. I cover the entire precinct. I am a bicycle officer. In March 1909, I covered the same territory, and previous to being on the bicycle I covered the territory around Mr. Killigan's residence. I was on the bicycle about 9 or ten years. Before that I was on foot around Mr. Killigan's residence. A transfer from foot patrolman to bicycle officer is a promotion. I know where Mrs. Sullivan's place of business is. My duties carry me in that neighborhood, at any time of the day

that I choose to ride there of my own volition. I have been in the habit of visiting that store and have seen Mr. Killigan there. He used to take care of the store for about two years, and until about the last six or seven months. I had occasion to converse with him and had occasion to observe him for the period beginning one year before March 30, 1909, and for two or three years afterwards. I observed his condition as to sobriety. While in charge of the store—taking care of the store, he was perfectly sober. In that time I may state he was off once or twice, I should judge, for a period of a week. I mean he was off drinking. He wasn't disposed to be violent. He was agreeable whenever I met Uncle Tom. Everybody calls him Uncle Tom around there. He was never disposed to make any trouble. I have talked with him about his relations towards his niece, Mrs. Sullivan. The way Uncle Tom would speak, you would think there was nobody in the world but Ada. He called her Ada. I should say their relations were friendly. Many is the time he spoke of the way she took care of him. The last time Uncle Tom was going to take a trip to Colonial Beach he spoke of this property. I said, Uncle Tom, it is nice to be able to take a trip. He said, yes, Ada is going to give me a trip to Colonial Beach. He spoke of deeding this property or willing it to her, whatever he did. He said, if I had property from that to 7th and Penn. Ave. I I would
93 give them all to her. Mr. Killigan is a man pretty well versed on the subjects of the day. I have no ill feeling towards him, and I don't think he has towards me. I hope not. I don't think I have a better well wisher in the world than Uncle Tom. He never stated to me that Ada, as he called her, had induced him to sign this deed. He made no such complaint.

Thereupon ALICE L. GULLI testified as follows:

My maiden name was Sullivan. I am a sister of Mrs. Ada Sullivan. I live at 517 Florida Avenue, N. W. My husband's place of business is 517 14th Street, N. W., right next to the Ebbit House. He is a jeweler by trade. I have known Mr. Killigan practically all my life, since I was able to know anything. He is my mother's sister's husband; an uncle by marriage. Edward J. Sullivan is my brother and younger than I am. He will be 24 years old next September. I remember speaking with him on one occasion in my house; a day or two after he testified in this case. He said he had hard feelings against Mrs. Sullivan. That was the only cause I could see—for he didn't say definitely that he assinged it to that cause, of testifying against her. He said that he was asked if he would come down here to testify against her and he said that he did, and he said that he thought it was no more than a dirty turn for her for what she gave him. I don't know that he just put it in these words, but that is what he meant. From his point of view, he seemed to think that she had done him a dirty turn. He didn't say what was his motive in testifying against her. He didn't say on that occasion that he would get even with her; not directly. He

94 just said it in a fit of temper. He said that she was the cause of him laboring like he was, and if things had been like they agreed that he would have had her business. He didn't exhibit any ill-will towards her that I know of. His sister and he had some kind of a verbal agreement about this cigar business that they went into. It seems as though they didn't agree after their money had been put into it. It seems he feels as though he was entitled to the business, and because she had carried on the business successfully, made him even more mad than if it had been a failure. He was willing to go into the business and take the risk. I have no ill feeling towards my uncle, Thomas J. Killigan. We are just as good friends today as we ever were. I don't know how he feels towards me. I have never asked him. He has never exhibited any animosity towards me. He has called at my house several times; not longer than three weeks ago. I had just no more than a cordial greeting; that is as far as it went. I left him in the house behind me. He stayed and went a while after I left. Mr. Killigan has never discussed any of his business with me at any time that I ever remember. He always expressed his feeling towards Ada as that she was very good which I think she was. He always expressed her in very endearing terms, and I was very much surprised to hear that things took the turn they did, because they always get along, so far as I could see—very well. From what I could see the treatment he received from her was alright. I know nothing of my own knowledge about the execution of the deed in controversy. Mr. Killigan never mentioned the matter to me. I knew that he had conveyed this 7th Street house to her sometime afterwards. "One day my sister said", Q. I don't ask you to say what your sister said, but did Mr. Killigan ever tell you about it? Mr. Killigan never told me about it, and I never referred to it to him.

Thereupon JAMES B. ARCHER was recalled, and testified as follows:

95 Mr. ARCHER: "Referring to page 36 of defendant's testimony, the stenographer's notes are entirely correct and they have what I said, but I was in error, and on reading the testimony, it occurred to me and I wish to correct it. The first question on that page is, "By Mr. Colbert: 'That ends the matter so far as I am concerned. Were you in this transaction employed by Mrs. Sullivan, formerly Mrs. Stahl?' A. I never was employed by her in any transaction in my life." I wish to add to that "until after this transaction with Mr. Killigan had been completed."

Cross-examination.

I was employed by Mrs. Sullivan in a non-support case that she had brought against her husband (meaning her first husband) after all my transactions with Mr. Killigan had been completed. I remember that Mr. Stahl did die, but don't know the time. My recollection is that he died before this property was conveyed. As I understand it, I got acquainted with Mrs. Stahl through Mr. Killigan, and afterwards brought a separation proceeding for her against her

husband. Id Mr. Stahl died before this deed was given, then I would be mistaken. My recollection was that I was employed in the maintenance suit after I had gotten acquainted with Mrs. Stahl through Mr. Killigan. Q. If Mrs. Stahl (Sullivan) had testified that she had employed you prior to the time that this deed in question was drawn, would you still believe that your employment by Mrs. Stahl (Sullivan) was subsequent to the time the deed was drawn. A. No, I would do this, Mr. Brown. I would look at the date of the deed and then I would look at the date of the proceedings between Mrs. Stahl and her husband, and those dates would absolutely satisfy the matter and show which was before and which was after.

The witness was then asked about certain testimony of Mrs. Sullivan's appearing on page 26 of the typewritten testimony and was asked, in view of the fact that she had testified differently, if he still testified that he was not employed by her prior to the drawing of

96 the deed; and the witness answered that he would not trust Mrs. Sullivan's recollection about time any more than

he would his own. The witness stated that we all knew that there was a will and a deed by Mr. Killigan, and we know that there was a maintenance suit by Mrs. Stahl, now Mrs. Sullivan, against her husband, John Stahl, and the dates of these instruments and that suit will fix the time better than I can do and she can do. I don't know where Mrs. Stahl was living when the maintenance suit was brought. I don't know that she was living on R. I. Avenue at that time. The only place I ever saw her, except at my own office, was at Mr. Killigan's house.

Re-direct examination by Mr. COLBERT: I don't recall how long before Mr. Stahl's death it was that I filed this maintenance suit. The record will show that. I was present in Court this morning when the matter of my competency as a witness was discussed before Mr. Justice Barnard. The witness was then handed the original order being dated April 8, 1913. The witness then read the order.

At this point, counsel for Mr. Killigan read a written objection signed by Mr. Killigan, as follows: "I, Thomas J. Killigan, desire to state and now do state on the record, under oath, I having been previously duly sworn in this case as a witness, that I have in no way waived, and do not now waive my privilege and my right to insist on my privilege of objection to the testimony of the witness, James B. Archer, touching or concerning any matters or facts relating to the issues of fact involved in this cause, and particularly concerning any deed to or transfer of the property, No. 1713 Seventh Street, Northwest, Washington, D. C., by me to the defendant, Mary A. Sullivan; the said James B. Archer having testified, under oath, upon the record, that he was my attorney in the transaction of the transfer of the property.

97 "I further desire to state that I have simply testified heretofore in this case, my previous testimony in this regard being contained on Page 13 of the Plaintiff's Testimony filed in this cause, and being as follows: By Mr. BROWN: "Q. Did you or did you not have anything to do with the preparation of the deed that you signed on the 31st day of March, 1909? A. No, sir, I

did not. Q. Did you ever directly or indirectly direct the deed to be drawn? A. No, sir; I did not." On cross examination, my testimony being contained on page 29 of the Plaintiff's Testimony and being as follows: Questioned by Mr. COLBERT: "Do you recall who wrote this deed? A. I can't just now, no, sir. Q. Wasn't it Mr. Archer? A. May be it was. Q. Do you remember where you signed it? A. I signed it at the house. Q. You do remember that? A. Well, I had been drinking pretty heavy—Q. I asked you if you remembered it. A. I don't know as I did. Q. Did you give Mr. Archer any instructions about preparing this deed? A. No, sir, I did not engage Mr. Archer to prepare the deed. Q. Didn't he send you a bill? A. No, sir. Q. Didn't he bring suit against you? A. Not for that service, no sir."

"I further state that in giving my former testimony as above quoted, I did not waive and did not in any way intend to waive my privilege as client of said James B. Archer if in fact he was my attorney in this regard, but on the contrary, I have consistently insisted on my said privilege and at the only time or times that it was proper for me to insist, namely, when the testimony was offered, I, through my attorneys, I being present, insisted upon said privilege, namely at the hearing held on the 24th day of March, 1913, when said Archer was offered as a witness by the defendant, and I now decline to waive my said privilege, but insist upon it in every respect. (Signed) Thomas J. Killigan."

98 The witness, after discussion between counsel, continued as follows:

I haven't read a line of the testimony in this case except my own. I will perform my professional duty in this case as I see it. I regard it as very unjust to me that Mr. Killigan's statement, which was read by his counsel should be made and that he should object to my testifying in this case. I assume, however, that Mr. Brown, himself, does not think it would be proper for me to testify under the circumstances. Am I correct about that, Mr. Brown? I appeal to Mr. Brown whether he thinks I ought to testify in this case as a professional brother. Mr. BROWN: In answer to that appeal to counsel for the plaintiff, counsel say that the testimony that was given by Mr. Killigan in chief on direct examination by his counsel has been spread upon the record this morning and read to the witness, Mr. Archer; that that testimony had no reference whatever to Mr. Archer, and had no reference whatever to any relationship between attorney and client; that the relationship between attorney and client was brought out on cross examination and not responsive to the direct examination; but notwithstanding that fact, and with a desire to have everything spread upon the record that is fair to both plaintiff and the defendant, the counsel will not object to any testimony to be given by the witness, Mr. Archer, that has any relation to what was brought out on direct examination by Mr. Killigan's counsel, or even what was brought out on cross-examination by Mr. Colbert, although counsel for the plaintiff contends that that

was not responsive or did not relate to the testimony given in direct examination.

The WITNESS: Do I understand counsel waives the privilege of his client? Mr. BROWN: Just in that way I say. The WITNESS: I don't propose to be made the judge in this case and am only a witness. I knew of no thing that satisfies me that Mr. Killigan has waived his privilege to keep me from testifying in this case, and theretofore I do not feel at liberty to testify. Moreover, in a proper case I would have conscientious scruples about testifying even if I was directed by a judge to do so, and in the present state of this record, so far as I understand it, I will not answer any question relative to this transaction.

Mr. COLBERT: Then I will have to ask you for a further
99 certification, Mr. Examiner,—after answering this question.

Mr. Archer, assuming that a judge of the Supreme Court of the District of Columbia should direct you to answer these questions, do you mean to say that you would not obey that direction? The WITNESS: I don't know. I would want to think about it and take the advice of the best counsel I could find. Mr. COLBERT: I understand that you have made that statement that you would have conscientious scruples even if the Court did direct you? The WITNESS: In a proper case.

This question as to the testifying of the witness, Archer, was never again brought to the attention of the court or certified to it.

100

Testimony in Rebuttal.

The plaintiff called ALFRED G. BUHRMAN, who testified as follows: I am an assistant clerk for the Supreme Court of the District of Columbia and identify the papers in equity cause 27,479, Mary A. Stahl, plaintiff, versus John F. Stahl, defendant, which I have produced from the files of the Supreme Court of the District of Columbia this morning, being entitled a bill for divorce a mensa et thoro. The plaintiff then offered the said bill for divorce in evidence. The bill in that case was filed November 22, 1907.

The plaintiff then called CHRISTIAN F. UMHAU, who testified as follows: I am a plumber at 1714 7th Street, N. W., and have been there about 30 years. I have known Mr. Killigan for 25 or 30 years. I have known Mrs. Sullivan since they were little children—about 20 years. I have known Mrs. Ruppert about the same time. She and Mrs. Sullivan are sisters. I identify my signature to Mr. Killigan's will, dated October 12, 1908. I was present when Mr. Killigan signed it.

Counsel for the plaintiff then read to the witness the testimony of Dr. Roman and asked this witness if he was in a position to observe as to whether Mr. Killigan had been drinking previous to the time of the making of the will. The witness answered that he was drunk no doubt before that but at the present time, at that time, I

couldn't tell. Maybe a week or two weeks before that he was no doubt on a drunk. To the best of my knowledge I guess it was two or three weeks ahead of that. I am testifying from my personal knowledge and observation. At this length of time, from the time of the execution of the will, I cannot fix the time previous to the execution of the will that I saw him drunk or that I observed that he had been drinking any more definitely than I have testified. I fix the time as a week or two or three weeks because it was a short while after his wife's death and he was on a spell of drinking then for quite a little while. That is how I fix the time. He was pretty well broken up at the time. He was worried a whole lot and no doubt that caused him to drink a good deal. On the night of the signing of the will I was just about the same distance from him as we are now. I couldn't tell whether there was liquor on his breath or not. I wasn't close enough for that. A lady came over and called me over and told me that Uncle Tom was going to make a will and for me to come over and witness it. My recollection is that it was a
101 lady but I just couldn't make out. She just came in and hollered in the door "Uncle Tom wants you to come over there and witness a will" and that is all I know. It was a niece of Mr. Killigan but who it was I never really paid any attention to it at the time. It came so unexpectedly that I paid no attention to it. I think it was one of the nieces but I couldn't be quite positive about it. The expression was "Uncle Tom wants you to come and witness a will." It was a lady and not a man. On cross-examination, the witness testified: I had known Mr. Killigan 25 years. I never regarded him as an insane person and don't think so now. At the time he made this will in my judgment he was in the possession of his senses. If I thought otherwise I would not have signed the will as a witness. When he signed his name to that paper in my judgment he was capable of understanding what it was and what he was doing. I think so now and I thought so then.

Thereupon, MARGARET A. RUPPERT was called and testified as follows: I am a sister of Mrs. Sullivan and am 4 years younger than she. I live at 1715½ 7th St., N. W. I am the niece my aunt raised. On or about Oct. 12, 1908, I did not go to get Mr. Umhau to witness a will. At that time I was at 125 W. St. N. W. I know Policeman Thomas Sweeney. We are justly friendly, that is all. I have seen him at Mrs. Sullivan's store helping her out in relief work at the store. He has been helping her out about 2 years. I did not see him in uniform helping her at the store. He would have a vest on and in his shirt sleeves or a sweater. I helped my sister at the store and was helping her in the months of November and December, 1912, and January, 1913.

Thereupon, the witness was referred to certain testimony of Mrs. Sullivan on page 18 of the typewritten transcript where Mrs. Sullivan stated that Mr. Killigan had been back to the house since the suit was filed and at which point Mrs. Sullivan stated that Mr. Killigan called her out in the hall about supper time. Mrs. Sullivan

had further stated that Mr. Killigan had stated that he did not want any supper, but that she replied "Come on, it is no use for you to act stubborn." Mr. Killigan then stated, according to Mrs. Sullivan,

102 "Give me a quarter," to which she replied, "If I give you a quarter you will only go out and get something to drink with it. Come on and get your supper and then go. According to Mrs. Sullivan, Mr. Killigan then stated, No, give me a quarter and I will come right back and eat my supper and go to bed. My sister Margaret was there and Mr. Sullivan and all of them sat at the table and heard him."

The witness was then asked if she, Mrs. Ruppert, heard any such conversation. She replied as follows: No, sir, I did not. It was in the hall. We were in the kitchen and eating and this conversation occurred in the hall. I did not hear any of the conversation in the hall. I was not near enough to hear it. The witness' attention was then called to Mrs. Sullivan's testimony in which she states that Mr. Killigan said "Ada, you and I are having it, ain't we" to which she replied "Well, Uncle Tom, you started it; I didn't. What occasion did you have to start it and he replied Oh I don't know; it is my sisters that put it in my head to do this, only for them I would never do anything like this. Mrs. Sullivan then said, Well if it is through it is going to go through now as long as you started it. Mrs. Sullivan testified that Mr. Killigan replied "No I am going down to withdraw it." And that she then gave him a quarter and told him to come back and eat his supper; that he went down the steps and came back another time at the store when Mrs. Sullivan was not present but her sister was present and Mrs. Sullivan testified that Mr. Killigan related the same story to her sister. The witness, Mrs. Ruppert, was then asked as to whether Mr. Killigan related any such story at the store and the witness replied that he did not.

The witness proceeded as follows: That night which has been referred to, I told Uncle Tom to come back here and do the right thing and to be at the store and help Ada out and he replied that he would not come back again.

On cross-examination witness testified: The conversation I have just related took place at Mrs. Sullivan's store. He didn't tell me why he came there. I couldn't say that he inquired for my sister
103 Ada. He did not give me any reason why he came in the store when he was having litigation with Ada. When he came to the house a day or two before he visited the store I don't know why he came there. I talked with him at the house. He was not sober but was able to talk intelligently. I said to him How do you do Uncle Tom. He answered, "Hello, Margaret." I don't know whether he knew what I was saying to him or not. He was not sober. He was drunk. Then he went out into the hall and had some talk with Ada for about 15 minutes. I don't know whether she gave him any money or not. I don't know why he came there. Nobody had sent for him. He came of his own motion. I lived in the 7th Street house with my sister Ada from the time I came from

California until 3 months ago. (meaning 3 months prior to May 5, 1913). I had no unpleasantness with Ada up to three months ago. We were pretty good friends. I am here testifying simply because I am ready here to tell the truth. I wasn't summoned by anyone. I just came down to testify to what they asked me. I have spoken to my sister recently. This morning when she came in the door I spoke to her. I couldn't say that Mr. Sweeney helped her while he was on duty. I don't mean to say that there was anything wrong about that. I am now living at 1715½ 7th Street where I run a store. I came back from California in October, 1911 and continued to live with my sister. She didn't help me any more than I helped her. I am now proceeding for a divorce from my husband. My sister gave me all the aid and comfort she could and I have always given her all the aid and comfort I could.

THOMAS J. KILLIGAN was then recalled and testified:

That the alleged conversation referred to by Mr. Sullivan in her testimony to the effect that she told Mr. Killigan that she and he were having it and that he, Uncle Tom, started it, and that he stated that his sisters had put it in his head to do so and that only for them he never would do anything like it and that Mrs. Sullivan stated that if it is through it is going to go through as long as he started and that Mr. Killigan stated that he was going down town and withdraw the suit, did not take place. The conversation which

took place was: "Why she asked me to withdraw the suit and
104 I told her I would do so if she would deed my property back to me. She said she would do so. I told her that she could come down and see my attorneys and she said she would do so. I came down and told Mr. Brown about it the next morning. She gave me a quarter and told me to go and get a new hat at Mrs. Brown's. I went around and saw Mrs. Brown. I was present when Mrs. Brown testified. I have been present at all sessions where testimony has been taken both for the plaintiff and for the defendant.

Q. On page 53 of Mrs. Brown's testimony, in answer to a question she says: "He was at the store a few days before Christmas to get a hat and a pair of shoes—this past Christmas, and he had some change in his hands, and he said 'I was around at Ada's and look what she gave me.' He said 'She is the best friend I have.' He said 'I regret what I have done. I have been under bad influence.' I said 'Uncle Tom, what made you do it. He said 'I am sorry Mrs. Brown, I have been under bad influence.' State whether or not that conversation ever occurred? A. No, sir, it did not. Q. What was the conversation Mr. Killigan, that occurred between you and Mrs. Brown, if any? "Why I told her that I was going to withdraw the suit and that Ada was going to deed the property back to me." On cross-examination, the witness testified: I am clear in my recollection as to what took place when I first went to see Ada. I remember distinctly in going around to Mrs. Brown's afterwards. I had been drinking but I was not drunk. I went to the house that night to see Margaret. I did not go to see Ada. I spoke to Margaret.

Q. She says that all you said was "How do Margaret." What did you go to see her for just to say "How do" to her? A. That is all I guess, yes. I don't know that I had seen her shortly before that. I didn't have any business to transact with her and did not have anything particular to say to her. After greeting Margaret I walked out in the hall and talked with Ada and had nothing more to say to Margaret. I don't remember asking Ada for any money. I think she gave me a quarter. She invited me to supper but I told her I would not take supper. I think she asked me to come back afterwards and have supper. I did not come back. When she told me that she was going to deed the property back to me
105 nobody was present except she and I. This was out in the hall. I called her out in the hall to ask her for a quarter. I suppose that is what I went there for. A moment ago I said that I went there to see Margaret. I went to see Margaret and also to get a quarter from Ada. She did not send for me. I guess I had been drinking. I say I was drinking.

Thereupon, the defendant, Mary A. Sullivan was called by the plaintiff and testified as follows: I did not bring more than one suit against Mr. Stahl for divorce that I know of. I didn't bring the divorce either. Afterwards we compromised and recalled it. I went to see Mr. Toomey and stated the facts to him, of his bad treatment of me and his cruelty and that he didn't properly support me. I identify my signature to the bill. I suppose I swore to it. I never entered proceedings with Mr. Archer. I went to see Mr. Archer but there were no papers entered. He gave Mr. Stahl a talking to.

Q. You heard Mr. Archer's testimony that he had brought the proceedings for you. A. Yes sir. It was not the same one. If he said he brought suit it must be so.

Thereupon, counsel for plaintiff offered in evidence paragraph 5 of said bill of complaint for divorce a mensa et thoro; as follows:

"That he has persisted in the above conduct for the past six years and complainant has patiently borne said insults and cruel and inhuman treatment until recently, when, on account of his violent outbreaks, complainant is in such a nervous condition that her health is greatly endangered; that in the month of February of this year, while they were residing at No. 631 Rhode Island Avenue, Northwest, the defendant, who had been drinking struck the complainant several blows on the body, pulled her hair and kicked her so that it was necessary to send for Dr. F. O. Roman for medical attention for her, that an examination of the complainant showed that she had been badly beaten and bruised, that complainant became so nervous and hysterical after this assault that she was forced to leave the defendant and with her child went to live with her aunt for safety and protection, that she remained away from the defendant for about three weeks or a month during which time the defendant continually pleaded with complainant to return, promis-

106 ing to reform and take a pledge never to drink again, that in consequence of said pleadings and promises of the defendant she returned to live with him, and that a short time thereafter he broke the pledge aforesaid and started drinking again, and that thereafter he used the vilest language to complainant in the presence of people who were boarding with them, threatened bodily harm to complainant and in the presence of strangers and friends at their house was accustomed to accuse complainant falsely of improper conduct with other men."

At that time Dr. Roman attended me at my aunt's request but he was not my physician. He was my aunt's physician. I heard Dr. Roman testify that he met me at the time of the execution of the will and that he was not her regular physician but that he had attended her. I don't think he testified that he met me for the first time when the will was made. He did not say that. He attended my aunt during her illness. He only attended me once. I never had him any other time. I have known Dr. Roman the same as I have lots of other physicians. I can't state exactly how long I knew him socially. I couldn't say that it was quite a little while prior to February, 1907, that I had known him socially. He only came once at my aunt's request. My aunt telephoned for him.

The plaintiff's Exhibit No. 1 is the deed in controversy and is as follows:

Recorded March 31, 1909, at 11:51 A. M.

Deed No. 25.

Liber 3228, Folio 11 et seq.

• THOMAS J. KILLIGAN
to
MARY A. STAHL.

This Deed, made this ^{13th} ~~thirteenth~~ day of March in the year one thousand nine hundred and nine by and between Thomas J. Killigan, of the City of Washington, District of Columbia, party of the first part, and Mary A. Stahl, party of the second part.

Witnesseth, That in consideration of Ten (\$10.00) Dollars, the party of the first part does grant unto the party of the second part, in fee simple, all those pieces or parcels of land in the City of Washington, District of Columbia, described as follows: to-wit: subdivision
107 Lots seventeen (17) and G in square 442, together with the improvements, rights, privileges, and appurtenances to the same belonging. And the said party of the first part covenants that he will warrant specially the property hereby conveyed; and that he will execute such further assurances of said land as may be requisite.

Witness — hand and seal the day and year hereinbefore written.

THOMAS J. KILLIGAN. [SEAL.]

In the presence of—

LAWRENCE HUFTY.

District of Columbia, to wit: I, Lawrence Hufty, a Notary Public in and for the District of Columbia, do hereby certify that Thomas J. Killigan of the City of Washington, District of Columbia, widower, party to a certain deed bearing date on the 30th day of March, 1909, and hereto annexed, personally appeared before me in said District, the said Thomas J. Killigan being personally well known to me as the person who executed the said deed, and acknowledged the same to be his act and deed. Given under my hand and seal this 31st day of March, 1909.

(NOTARIAL SEAL.)

LAWRENCE HUFTY. [SEAL.]
Notary Public, D. C.

The defendant's exhibit No. 1, is the will of Thomas J. Killigan and is as follows:

"Last Will and Testament of Thomas J. Killigan.

"In the name of God, Amen!

I, Thomas J. Killigan, being of sound and disposing mind, memory and understanding, and wishing to make an orderly arrangement of my worldly affairs whilst my physical condition will permit it to be done to my satisfaction, do make, publish and declare this my last will and testament, devising as follows, that is to say:

First; I direct that my burial shall be under the superintendence of my friend, John B. Geier; that my funeral be observed with proper Roman Catholic rights at the Church of the Immaculate Conception in this City, and that as soon after my
108 decease as possible my executor shall cause to be erected over my grave and that of my beloved wife in Mt. Olivet Cemetery a monument to cost not less than Three hundred and twenty-five dollars.

"Second. I give and bequeath to my sisters, Kate and Josephine Killigan, the sum of One thousand dollars each.

"Third. After payment of my funeral expenses, the legacies above mentioned and all my just debts, I give, devise and bequeath all the rest and residue of my estate, real, personal and mixed, wheresoever situated, of which I shall die seized to my niece by marriage, Mary Ada Stahl, absolutely, in fee simple.

"Fourth. I hereby nominate, constitute and appoint my friend, James W. Springmann, the executor of this my last will and testament.

"Fifth. I have made no provision in this will for masses for the repose of the souls of my wife and myself because I rely upon the devotion of my niece aforesaid to properly remember us in that respect.

"In testimony whereof I have hereunto set my hand and seal to the two pages constituting this my last will and testament, executed in duplicate at Washington, D. C., this twelfth day of October, 1908.

THOMAS J. KILLIGAN. [SEAL.]

Signed, sealed, published and declared by the above named Thomas J. Killigan as and for his last will and testament in the presence of us, who at his request; in his presence, and in the presence of each other have subscribed our names hereto as attesting witnesses at Washington, D. C., this twelfth day of October, 1908.

FREDERICK O. ROMAN,

Address 1435 9th St. N. W.

C. F. UMHAU,

Address 1714 7th St. N. W.

109 The plaintiff reserves the right to have the said original deed and the original will produced before the Court of Appeals at the hearing of this cause on appeal from the records of the Supreme Court of the District of Columbia and counsel for the defendant, Mary A. Sullivan, consents thereto.

The foregoing being a true and complete statement, in condensed form, of the whole of the testimony adduced on behalf of the respective parties, and the exhibits introduced by them, as the same was heard and considered in this court, the same is hereby approved and certified and made a part of the record in this case for the purpose of appeal, this the 8th day of August 1913, being signed in duplicate.

JOB BARNARD, *Justice.*

Endorsed on cover: District of Columbia Supreme Court. No. 2587. Mary A. Sullivan vs. Thomas J. Killigan. Court of Appeals District of Columbia. Filed Aug. 15, 1913. Henry W. Hodges, Clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT-8--1913

Henry W. H. H. H.
Bank

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1913.

No. 2587.

MARY A. SULLIVAN, APPELLANT,

vs.

THOMAS J. KILLIGAN, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

MICHAEL J. COLBERT,

LEVI H. DAVID,

Attorneys for Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

SUBJECT INDEX.

A.

1. Statement of the case	1-5
2. Points of law involved	5
3. Assignment of errors	5-6
4. Argument:	
Assignment I, exclusion of Archer as a witness.....	7-18
Assignment II, laches of plaintiff	18-22
Assignments III, IV, and V, testimony on plaintiff's behalf insufficient to justify decree	22-29

B.

TABLE OF CASES CITED.

Am. & Eng. Ency. Law, second ed. (18 vol., 105).....	21
Am. & Eng. Ency. Law, second ed. (23 vol., 60-61-65).....	13, 15, 12
Badger <i>vs.</i> Badger (2 Wall., 87, 95).....	21
Bauer, <i>Re</i> (79 Cal., 312).....	16
Blackburn <i>vs.</i> Crawfords (3 Wall., 192-4).....	11
Brandt <i>vs.</i> Klein (17 Johns, 335)	16
Brown <i>vs.</i> Co. of Buena Vista (95 U. S., 157).....	20
Chase <i>vs.</i> Winans (59 Md., 475).....	20
Childs <i>vs.</i> Merrill (66 Vt., 302)	15
Chillicothe Ferry Co. <i>vs.</i> Jameson (48 Ill., 281)	16
Conley <i>vs.</i> Nailer (118 U. S., 127).....	
Coveney <i>vs.</i> Tannahill (1 Hill, 33).....	17
Crutchfield <i>vs.</i> Hewett (2 App. Cas., 373).....	21
Crosby <i>vs.</i> Berger (11 Paige, 377).....	16
Daniel <i>vs.</i> Daniel (39 Pa. St., 191)	16
Davies <i>vs.</i> Waters (9 M. & W., 611)	16
Dickerson <i>vs.</i> Evans (84 Ill. Rep., 451-4).....	26
Dikeman <i>vs.</i> Arnold (78 Mich., 455).....	15
Earle <i>vs.</i> Grout (46 Vt., 125)	14

Galliher <i>vs.</i> Cadwell (145 U. S., 368)	20
Glover <i>vs.</i> Patten (165 U. S., 408)	13
Granger <i>vs.</i> Warrington (3 Gil [Ill.], 299,308)	11
Greer <i>vs.</i> Greer (58 Hun., 251)	15
Greenleaf on Ev. (vol. 1, 10th ed., 245)	16
Hammond <i>vs.</i> Hopkins (143 U. S., 224)	20
Hanlow <i>vs.</i> Doherty (109 Ind., 43)	13
Harwood <i>vs.</i> R. R. Co. (17 Wall., 78)	20
Hatton <i>vs.</i> Robinson (14 Pick., 416, 422-3)	11
Hebbard <i>vs.</i> Haughian (70 N. Y., 54)	15
Hughes <i>vs.</i> Boone (102 N. C., 137)	17
Hummel <i>vs.</i> Kistner (182 Pa. St., 216)	16
Hunt <i>vs.</i> Blackburn (128 U. S., 464-470)	11
Howland <i>vs.</i> Blake (97 U. S., 626)	23
Ins. Co. <i>vs.</i> Nelson (103 U. S., 548)	23
Lane & Bodley Co. <i>vs.</i> Locke (150 U. S., 201)	22
Levis <i>vs.</i> Kengla (8 App. Cas., 238)	21, 25
Mackall <i>vs.</i> Casilear (137 U. S., 566)	20
Madre <i>vs.</i> Gaskins (39 App. Cas., 19)	16, 23
Moore <i>vs.</i> Terrell (4 Barn. & Adol., 870)	17
Morris <i>vs.</i> Haggin (136 U. S., 386)	20
Moore <i>vs.</i> Crawford (130 U. S., 122)	23
O'Connell <i>vs.</i> Koob (16 App. Cas., 161)	16, 23, 26
Olmstead <i>vs.</i> Webb (5 App. Cas., 51)	11
Pomeroy on Eq. Jur. (vol. 2, sec. 965)	29
Preston <i>vs.</i> Horwitz (85 Md., 1711)	20
Quirk <i>vs.</i> Liebert (12 App. Cas., 394)	20
Reahm <i>vs.</i> The State (30 Tex. C. A. Rep., 310)	13
Richards <i>vs.</i> Mackall (124 U. S., 183)	21
Robb <i>vs.</i> Vos (154 U. S., 41)	17
Rosseau <i>vs.</i> Bleau (131 N. Y., 177)	16
Ruiz <i>vs.</i> Dow (113 Cal., 490)	16
Smith <i>vs.</i> Gilmore (7 App. Cas., 192)	17
Smith <i>vs.</i> Long (106 Ill., 485)	15
State <i>ex Rel.</i> <i>vs.</i> West (68 Mo., 232)	
Sullivan <i>vs.</i> R. R. Co. (94 U. S., 806)	21
Thompson <i>vs.</i> Howard (31 Mich., 309)	17

INDEX.

iii

Van Alstyne <i>vs.</i> Smith (82 Hun., 382)	15
Warner <i>vs.</i> Jackson (7 App. Cas., 216)	26
Wharton on Crim. Ev., 2d ed. (vol. 1, 503)	16
Whiting <i>vs.</i> Barney (30 N. Y., 330)	13
Wicks <i>vs.</i> Dean (103 Ky., 69)	16
Young <i>vs.</i> Duvall (109 U. S., 573)	23

IN THE
Court of Appeals, District of Columbia.

OCTOBER TERM, 1913.

No. 2587.

MARY A. SULLIVAN, APPELLANT,

vs.

THOMAS J. KILLIGAN, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

Statement of the Case.

This is an appeal from a decree of the Supreme Court of the District of Columbia made on June 15, 1913, setting aside and vacating a deed executed by the appellee to the appellant, conveying certain real estate in the city of Washington (Rec., p. 11). As the allegations of the bill of complaint become important, they are briefly stated as follows:

On August 31, 1912, Thomas J. Killigan filed his bill in the Supreme Court of the District of Columbia against the

appellant, Mary A. Sullivan, and her husband, alleging that on March 31, 1909, the appellant, who is the niece of Mr. Killigan's deceased wife, importuned Killigan to convey to her the property in controversy, suggesting as a reason therefor the habits of intoxication of the plaintiff, which rendered him at times incapable of properly attending to his business and assuring him that if he would make the conveyance she would manage the property for his benefit. It is also alleged in the bill that Killigan's habits had been such as to affect his mind and to weaken his intellect. It is alleged further that on March 30, 1909, Mrs. Sullivan procured the preparation of the deed in question and on the forenoon of that day falsely represented to him that she had arranged to have a deed in trust prepared for his signature, which, however, he failed to read, but that he signed the instrument believing it to be a deed in trust, which he afterwards learned was recorded among the land records of the District of Columbia (Rec., p. 3). The plaintiff further alleged that on that day he was so impaired in body and mind that he was not capable of making a valid deed or contract and that his weakness in this respect was known to Mrs. Sullivan, who had unduly influenced him in the matter of signing the deed, knowing that he had not taken independent advice in the matter. No specification is made in the bill of any undue influence or misrepresentation, except that Mrs. Sullivan had represented the instrument in question to be a deed in trust instead of an absolute conveyance. In the same paragraph of the bill it is alleged by Killigan that he was defrauded into signing an instrument represented to him to be of one character while in fact it was of another character, and at the same time it is alleged that he was mentally and physically incapable of executing any valid deed or contract (Rec., p. 3).

It is further charged that no consideration, or at most a grossly inadequate consideration, was given for the execution of the deed in question. After the date of the deed Mrs. Sullivan continued to live in the premises with her

uncle until shortly before the filing of the suit in 1912. After the signing of the deed Killigan states that he learned that the paper was in fact an absolute conveyance, and he then demanded from Mrs. Sullivan that she reconvey the property to him, and that she would at any time thereafter convey the property back to him whenever he wanted. He further states that about June 1, 1912, he made a demand on Mrs. Sullivan for such reconveyance, but then for the first time she refused to reconvey the property as she had agreed to do.

The substantial prayer of the bill is that the conveyance in question should be decreed to be void and of no effect and that it should be set aside (Rec., p. 5).

Mrs. Sullivan answered the bill of complaint fully denying the allegations of the bill in all its essential parts, and stating further that the real estate was formerly owned by Killigan, but had been conveyed by him in his lifetime to his wife, Mary E. Killigan, who in turn, by her will, had devised the same back to her husband. The answer further states that after the death of his wife Killigan lost all interest in his business and declared his purpose not to engage in any further work or occupation; that he invited Mrs. Sullivan to make her home with him and to look after his comfort and his household, all of which she did without recompense, except that she and her husband and child made their home in the premises in question. She further states that Killigan frequently announced his intention of conveying to her the property in dispute, stating that he knew that she would look after him as long as he lived, and that he himself sent for Mr. James B. Archer, a lawyer, and gave said Archer the directions to prepare the deed in controversy. She further states in her answer that Killigan made the statement that he knew that if he retained the property in his own name that he would squander all he had, and that he knew that Mrs. Sullivan would always give him a home and all that he needed. She states that she in turn always told him that she would provide for him as long as

he lived and give him everything that was necessary, although this was not a condition or consideration for the execution of the deed (Rec., p. 9).

This answer was sworn to by Mrs. Sullivan, and as answer under oath was not waived in the bill it has all the force and effect of evidence.

It will be observed that the substantial allegations of the bill are (1) mental incapacity on the part of the grantor, (2) undue influence on the part of the grantee in urging and importuning him to make the deed when he was mentally and physically unable to resist such importunities, and (3) active fraud committed upon him by representing to him that the instrument executed was a deed in trust while it was in fact an absolute conveyance of the property in dispute.

We invite the court's attention to the total failure of proof, as shown by the record, to support any of these allegations. Mr. Killigan himself stated at the time he was on the stand that he was mentally and physically as sound as he ever was (Rec., p. 22). He simply claims that at the time the deed was actually executed he was in an intoxicated condition. He gives no evidence whatever of any undue influence or persuasion, and beyond his own unsupported statement he produces no proof of any misrepresentation or fraud.

During the course of the trial Mr. James B. Archer, a member of the bar of the Supreme Court of the District of Columbia and of the bar of this court, was called as a witness on behalf of Mrs. Sullivan. But Mr. Killigan, while denying that Mr. Archer was his attorney in the matter of the preparation and execution of the deed in dispute, and while denying that he had ever employed Mr. Archer in any professional capacity in this regard, objected to his testimony on the ground that Archer was not to be permitted to disclose confidential communications between himself and Killigan, although Killigan himself had testified fully in relation to every detail within his knowledge as to the circumstances under which the deed was prepared and executed.

The question of the competency of Mr. Archer's testimony was certified to Mr. Justice Barnard for decision, and by his order found on pages 10-11 of the record he directed that any testimony that Mr. Archer might be asked to give would be privileged and incompetent unless the witness, Mr. Archer, himself should be satisfied that his client had waived the privileged communication in some way, and even then that Mr. Archer need not answer the question unless he voluntarily determined so to do.

The deed in dispute was executed on the 30th day of March, 1909, and the bill to set it aside was not filed until August 31, 1912, more than three years thereafter. The competency of Mr. Archer's testimony, the decree of Judge Barnard in relation thereto, and the laches of the plaintiff in filing his bill, as well as the total failure of the plaintiff to support the allegation of his bill by a preponderance of the evidence, will all be discussed in their order.

Assignment of Errors.

The court erred as follows:

1. In entering the order dated April 8, 1913, holding that any testimony Mr. Archer might be asked to give in regard to the transaction between the grantor and grantee named in the deed in controversy "is privileged and not competent to be offered and given in evidence unless the witness, Mr. Archer, shall be satisfied that his client has waived the privileged communication in some way, and he shall voluntarily answer the question so claimed to be privileged, in that event, if he shall so conclude."

- (a) In refusing to direct the witness James B. Archer to testify concerning matters and things connected with the execution and delivery of the deed in controversy.

- (b) In not directing and requiring said witness to testify

touching the preparation by Mr. Archer, and the execution by Mr. Killigan, of the said deed.

(c) In leaving it to the discretion of the witness James B. Archer as to whether he should testify or not accordingly as he, the witness, might deem proper.

2. In not dismissing the bill of complaint on the ground of the plaintiff's laches in not filing the present suit for more than three years after the execution and delivery of the deed in controversy, and for more than three years after the plaintiff admitted that he had knowledge thereof.

3. In holding that the testimony adduced on behalf of the plaintiff was sufficient to justify the court to set aside the deed in controversy upon the allegations of the bill and the prayers thereof.

4. In passing the final decree, setting aside and vacating said deed, vesting title to the real estate, described in the bill of complaint, in fee-simple in the plaintiff, and decreeing that the defendant, Mary A. Sullivan, should surrender forthwith possession of said real estate to the plaintiff.

5. In not dismissing the bill of complaint.

ARGUMENT.

ASSIGNMENT I.

The exclusion of Mr. Archer as a witness constitutes reversible error.

It must be conceded, we submit, that testimony from Mr. Archer, concerning what occurred upon the occasion of the visit of the grantor and grantee, at his office on March 30, 1909, in the presence of Mr. Killigan, Mrs. Sullivan, and Mr. Archer, and as to the directions given to Mr. Archer to draft the deed conveying the title in fee-simple, and who gave the directions, and regarding the mental and physical condition of Mr. Killigan at that time, is extremely important. If Mr. Archer is a competent witness to testify to these matters, then the defendant has been denied the benefit of testimony of the most vital significance. If the court erred in excluding Mr. Archer as a witness, and in resting its decree mainly, if not entirely, upon the testimony of the plaintiff himself, whose testimony, it is contended, is inconsistent, contradictory, and unsatisfactory, the appellant respectfully submits that a grave injustice has been done her.

Counsel for the defendant produced Mr. Archer as a witness on two separate occasions (Rec., pp. 44-47, 52-55) and endeavored to elicit from him the facts touching the preparation and execution of the deed. The learned court erroneously held, as we think, that the matter inquired of constituted a privileged communication between an attorney and his client, and refused to direct Mr. Archer to testify.

The questions which arise for decision under this assignment are:

Did the relation of attorney and client exist between Mr. Archer and Mr. Killigan, touching the preparation of the deed? If so, could the transaction be a privileged communi-

cation in a suit subsequently arising between the grantor and the grantee, inasmuch as both of them were present at the time of the transaction in Mr. Archer's office? If the relation existed, did Mr. Killigan waive the privilege, either expressly or impliedly? Was Mr. Archer the attorney of both grantor and grantee? Or was he, although an attorney, merely acting as a scrivener, whose legal advice was neither sought nor given?

The plaintiff, in his direct examination, testified:

"I had nothing to do with the preparation of the deed that I signed on March 31st, 1909. *I neither directly or indirectly directed the deed to be drawn*" (Rec., p. 20).

And on cross-examination he testified:

"I did not engage Mr. Archer to prepare the deed. He did not send me a bill. He rendered me a bill for former services in a suit I had against somebody who owed me money. I engaged him to collect some money for me in a suit. He was my lawyer in that suit. When this will was made and when this deed was made I just knew of Mr. Archer; that was all. I did not have much to do with him. I never paid him for writing that deed. He never wrote me a letter demanding payment" (Rec., p. 23).

The defendant testified that some months after Mr. Killigan had executed his will, dated October 12, 1908 (Rec., p. 61), (in which, after making two bequests to his two sisters, of one thousand dollars each, he devised all of his property to his niece, the appellant), Mr. Killigan and Mrs. Sullivan had a conversation regarding the will; that she expressed the opinion that she was afraid that his sisters some day would make trouble for her; that he asked her what she meant. Continuing, the witness testified:

"I said, Uncle Tom, they are your sisters, and I am only a niece to you by marriage. It is natural that they will feel nearer to you, and would want what you have. And he said, you oughtn't worry

about that. I said, I would rather not have anything if I had to have trouble over it. He said, I am going to deed that property to you, and then they won't give you any trouble. And I said, how can't they give me trouble? He said, no, a deed can't be broken. When I once deed it to you it will not be broken. He was sober at that time, and I said, Uncle Tom, that is all very well, but I said, tell you the truth, I would rather not have it if I had to have trouble over it. He said, Ada, you are the only one that has stuck by me, and if I had twice as much, I would give it to you. *And if my husband was living he would be a witness, but he is dead and can't speak for himself.*" * * *

"Mr. Archer prepared the deed, at the request of Uncle Tom. Uncle Tom had talked to me about deeding the house to me on two or three occasions, and I said, some day when you want to and you feel like going, I will go with you to Mr. Archer's office. And he said I want you to go with me. I think it was on a Monday, he said, I want you to go down town with me today to Mr. Archer's office. I am going to change that will, and deed that house to you. Have you got any money? He will want to be paid. I said, well, I have got a little, Uncle Tom. Do you know how much he is going to charge? He said, No, I don't know. I had ten dollars in my pocket, and I said I will take that along anyway. We both went on the car together to Mr. Archer's office, at which time Mr. Killigan was in his sober senses. He said, Mr. Archer, I want to deed my property over to my niece, Mrs. Stahl. That was all he said. Mr. Archer said, do you want me to draw up the deed now? He said, Yes. He (Mr. Archer) said, all right, I will draw it up and I will send a notary public to your house for you to sign it. I did not suggest who the notary should be. Mr. Archer selected the notary" (Rec., p. 37).

Mr. Killigan was recalled as a witness in rebuttal (Rec., pp. 58-59), but he did not deny that he was present with Mrs. Sullivan in Archer's office when the instructions for the preparation of the deed were given by him.

When Mr. Archer was upon the stand the following occurred:

"Q. What instructions, if any, did you receive from Mrs. Stahl, now Mrs. Sullivan, as to the preparation of this deed?

"A. None whatever.

"Q. Who, if any person, paid you for your services in this regard?

"A. Nobody paid me. I have no recollection as to who placed the instrument on record" (Rec., p. 46).

When Mr. Archer was called as a witness by the defendant, counsel for the plaintiff objected to any testimony that the witness might give in regard to any transaction involved in this suit on the ground that the same constituted a privileged communication (Rec., p. 44). Mr. Archer stated that he was employed by and acted for Mr. Killigan "in this transaction" (Rec., p. 45), meaning, as the record shows, the preparation of the deed in controversy. The witness was asked to state in whose handwriting the manuscript portion of the deed was, and the witness was also asked to state if he observed Mr. Killigan at the time the deed was prepared, and preceding the date of the preparation of the deed. On objection by counsel for the plaintiff, the witness declined to answer (Rec., pp. 45-46). He also declined to state at whose direction Mr. Hufty, the notary, took the acknowledgement to the deed (Rec., p. 46). Upon certification the court passed the order contained on pages 10-11 in the record, holding that any testimony Mr. Archer might be asked to give was privileged, and also left it to the discretion of the witness to testify only in the event the witness should conclude that "his client has waived the privileged communication in some way" (Rec., p. 11).

Thereafter Mr. Archer was recalled, and when counsel for defendant endeavored to elicit testimony from him objection was made by plaintiff's counsel, and the witness declined to testify (Rec., p. 45).

It is admitted, as matter of law, that the rule respecting communications between attorney and client is, that within the scope of the professional employment of an attorney, the *confidential* communications made to him by his client are privileged, and that, without the consent of the client, the attorney should neither be required nor permitted by the court, to testify concerning them. This rule is strictly construed, as it tends to exclude evidence of the facts, while the general rules of evidence require, on the contrary, that the facts be divulged (*Granger vs. Warrington*, 3 Gillman (Ill.), 299, 308; *Hatton vs. Robinson*, 14 Pick., 416, 422-3).

The privilege, therefore, does not extend to communications which are not confidential.

The privilege is that of the client and he may waive it, either expressly or impliedly (*Blackburn vs. Crawfords*, 3 Wallace, 192, 194; *Hunt vs. Blackburn*, 128 U. S., 464, 470). In the last case cited, the Supreme Court says:

“When Mrs. Blackburn entered upon a line of defense which involved what transpired between herself and Mr. Weatherford, and respecting which she testified, she waived her right to object to his giving his own account of the matter.”

In *Olmstead vs. Webb*, 5 App. Cas., 51, the trial court excluded the evidence of the attorney who drew the will—the validity of which was the subject of the suit—relating to the instructions given him by the testator.

In holding the ruling erroneous, this court said:

“There is another ground also upon which the admissibility of this testimony may be sustained. The evidence of the appellee involved a charge of shameful misconduct and attempted treachery upon the part of Jeffries, which, if undenied, would tend to greatly prejudice the case of appellant. If, therefore, the appellee and her mother stand in the right of Hayward M. Hutchinson, deceased, and may claim the privilege, they may also by their conduct waive it. The object of the rule ceases, and the attorney

is no longer bound by his obligation, when the client or representatives charge him, either directly or indirectly, with fraud or other improper or unprofessional conduct."

And in the same case certain testimony of another attorney was excluded by the trial court, and this court held this ruling was also error, saying (p. 55):

"We think it clear that Mrs. Hutchinson, by her attack upon the credit of the attorney, waived her right to command his silence to the extent of the inquiry made in the question which the court refused to permit him to answer. The testimony was material to the cause of appellant, and its exclusion constitutes reversible error."

In the case at bar, if the relationship of attorney and client existed between Mr. Archer and Mr. Killigan, the latter waived the privilege because: (1) The plaintiff alleged in his bill that the defendant falsely represented to him that she had arranged to have a deed in trust drawn up; (2) the defendant, at the request of the plaintiff, was present when the plaintiff directed Mr. Archer to draw the deed in fee; (3) the plaintiff denied, while under oath, as a witness in this case, that he ever, directly or indirectly, requested Mr. Archer to draft the deed, and denied that Mr. Archer was his attorney.

"An attorney employed by two or more persons to give professional advice or assistance in a matter in which they are mutually interested can, on litigation subsequently between such persons or their representatives, be examined as a witness, at the instance of either, as to communications made when he was acting as attorney for all. But he cannot disclose such communications in a controversy between his clients, or either of them, and third persons." 23 Am. & Eng. Enc. Law, 2d Ed., p. 65, citing many authorities.

In 23 Am. & Eng. Enc. Law, 2d Ed., p. 60, the author says:

“The mere fact that the person to whom the communication was made was an attorney will not render it privileged, for there are many cases in which an attorney is employed in transacting business not properly professional, but which might have been transacted by another agent. It must further appear that the attorney was consulted and acting as such and in his professional capacity, and not merely as a friend or agent of the person making the communication, or in some capacity not connected with his professional duties” (citing cases).

In a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. *Glover vs. Patten*, 165 U. S., 408.

In *Hanlow vs. Doherty*, 109 Ind., 43, the court said:

“The general rule is, that communications between attorney and client are privileged when they are confidential; but, where both parties are present, the communications cannot be regarded as confidential. It is obvious that where both parties are present the general rule cannot apply, for the element which gives vitality to the rule does not exist.”

“Where both parties are present at the time when a communication is made by one of them to his attorney or counsel, there is nothing confidential in the communication.”

Whiting vs. Barney, 30 N. Y., 330.

In *Reahm vs. The State*, 30 Tex. Court of Appeals Reports, 310, the court held:

“Where an attorney at law prepared and wrote a certain order for the defendant to sign, which order defendant subsequently swore he did not sign, and that his signature to such instrument was a forgery, held, that the attorney who prepared the instrument

was a competent witness to prove its execution by the defendant, and that the relation between the parties was not such as to render this testimony inadmissible upon the ground of privileged communications between attorney and client."

In *Earle vs. Grout*, 46 Vt., 125, the court says:

"J. B. Robinson was produced by the defendant as a witness, and excluded by the court, on the ground that Robinson had become possessed of the facts he was to give in evidence confidentially, as the attorney of the plaintiff. The defendant testified that he had never employed Robinson as his attorney in this suit. And Robinson testified that 'he never understood he was counsel, or to be counsel, in this matter. He talked over his matter with Grout, and discussed with me Grout's liability. I was doing his collecting generally. He had *consulted* me about *other* matters.' The burden is upon the party who seeks to have his statements suppressed as evidence, because they are privileged communications. The facts that would make them so must be proved. The general rule is, that a witness, called upon the stand, is bound to tell the whole truth. The communication, to be privileged, must have been made to the witness confidentially, as his counsel; the relation of counsel and client must have existed at the time, and the communication made for the purpose of obtaining counsel, advice, or direction, in regard to his legal rights. It is not required that the witness should have been retained generally in the matter upon which the party was seeking advice; but he must have been counsel upon the subject upon which the conference was had, and the communication made to him as such. The evidence, so far as it is stated in the exception, tends to show that the witness did not regard that the communication was made to him as counsel; nor is there any evidence that the plaintiff understood at the time he was consulting confidentially his counsel. We think it does not affirmatively appear that the communication was privileged, and that the exclusion of the witness Robinson was error."

In 23 Am. & Eng. Enc. Law, 2d ed., p. 61, the rule, supported by many cited cases, is laid down as follows:

“Accordingly, it is held that the rule of privilege does not apply in the case of a person acting as a mere scrivener, although he is a member of the legal profession. Consequently an attorney who is requested to prepare a deed or mortgage, no legal advice being required, may testify as to what comes to his knowledge in connection with such transaction, and when the terms of a contract have been agreed upon between the parties, and an attorney is afterwards employed as a scrivener merely to reduce the contract to writing, and no inquiry is made of him as to its legal effect, communications made to him while thus engaged will not be regarded as confidential.”

An attorney who is employed by two persons as a mere scrivener to draw a deed from one to another, is, as between such persons, competent to testify as to the directions received by him from the parties, and as to the transaction between them at the time, as knowledge acquired under such circumstances is not a privileged communication. *Childs vs. Merrill*, 66 Vt., 302; *Hebbard vs. Haughian*, 70 N. Y., 54; *Dikeman vs. Arnold*, 78 Mich., 455; *Smith vs. Long*, 106 Ill., 485. Thus, where it is charged that a clause was fraudulently inserted in a deed without the knowledge of the grantees, the testimony of the attorney who drew the deed as to the instructions given him when the instrument was prepared is competent. *Van Alstyne vs. Smith*, 82 Hun., 382. So, the testimony of an attorney that he drew a deed for a person, since deceased, and took his acknowledgement, and that the description in the deed embraced a certain parcel of land, may be received where it appears that the deed was drawn, executed and acknowledged in the presence of the grantee. *Greer vs. Greer*, 58 Hun., 251. And on a bill in equity to set aside a deed made by a father in his lifetime to his daughter, the declarations of the deceased to his attorney while the latter was writing the deed are not

privileged, if they were made in the presence of both parties to the transaction. *Hummel vs. Kistner*, 182 Pa. St., 216. If a husband makes a deed of gift to his wife, his attorney may testify, on behalf of the wife, as to the husband's instructions with respect to a delivery of the deed to a third person, where such instructions were given mostly in the presence of the wife. *Ruiz vs. Dow*, 113 Cal., 490. An attorney who draws a deed may testify that it was given to be delivered to the grantee. *Rosseau vs. Bleau*, 131 N. Y., 177; and he may testify as to the condition of mind of one who instructed him to prepare certain deeds. *Wicks vs. Dean*, 103 Ky., 69.

In *Wicks vs. Dean*, 103 Ky., 69, it is held that a statute providing that "no attorney shall testify concerning a communication made to him in his professional character by his client, or his advice thereon without the client's consent," will not prevent an attorney from testifying as to the condition of his client's mind when she instructed him to prepare certain deeds. See, also, *Daniel vs. Daniel*, 39 Pa. St., 191; 1 Whart. Crim. Ev. (16th ed.), sec. 503; 1 Greenlf. on Ev. (10th ed.), 245; *Davies vs. Waters*, 9 M. & W., 611; *Crosby vs. Berger*, 11 Paige (N. Y.), 377; *Brandt vs. Klein*, 17 Johns. (N. Y.), 335; *Chillicothe Ferry Co. vs. Jameson*, 48 Ill., 281.

In the cases of *O'Connell vs. Koob*, 16 App. Cas., 161, and *Madre vs. Gaskins*, 39 App. Cas., 19 (brought to set aside voluntary conveyances), the attorneys who drafted the deeds testified in detail and their testimony was received and considered by the court.

In *In re Bauer*, 79 Cal., 312, the court says:

"The attorney at law who drew the declaration of homestead, and was at the time apparently acting for the deceased and his wife in the matter, was interrogated on behalf of contestant as to whether the recital in the declaration of homestead was explained to Mrs. Bauer, if she understood it, what explanation was given, and what she knew about the matter.

This was objected to on the ground that it called for a privileged communication between attorney and client, and was sustained and excepted to. The objection should have been overruled. When two persons address a lawyer as their common agent, their communications to the lawyer, as far as concerns strangers, will be privileged, but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations."

Whether a communication is privileged is for the court to decide. *Coveney vs. Tannahill*, 1 Hill, 33; *Hughes vs. Boone*, 102 N. C., 137; *Moore vs. Terrell*, 4 Barn. & Adol., 870.

In the case at bar the court left the matter to the discretion of the witness.

The plaintiff having testified that he "had nothing to do with the preparation of the deed"; that he "neither directly nor indirectly directed the deed to be drawn" (Rec., p. 20); that he "did not engage Mr. Archer to prepare the deed" (Rec., p. 23), as part of his case in chief, he should not be permitted to assume the contrary position and insist that Mr. Archer was his attorney, when the defendant produced Mr. Archer to testify as to what occurred in the presence of the plaintiff and the defendant regarding the preparation of the deed.

In *Robb vs. Vos*, 155 U. S., 41, the Supreme Court says:

"A man may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge or the means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again."

See, also, to the same effect: *Thompson vs. Howard*, 31 Mich., 309, and *Smith vs. Gilmore*, 7 App. Cas., 192.

One of the sweeping and almost reckless averments of plaintiff's bill is that the defendant "well knew the plaintiff's infirmity and mental weakness and thereby unduly influenced him in signing said deed, well knowing that the plaintiff had not taken any independent advice in the matter" (Rec., p. 3). Not only does the plaintiff utterly fail to establish that allegation, but when the defendant calls the attorney to whom both plaintiff and defendant went to have the deed prepared, in order to obtain his testimony touching plaintiff's mental condition at the time and throw light upon the question surrounding the transaction, the plaintiff objects on the ground that the subject matter constitutes a privileged communication!

ASSIGNMENT II.

The laches of plaintiff disentitle him to relief.

The deed is dated March 30, 1909. It was acknowledged and recorded March 31, 1909.

The plaintiff testified that he found out two or three weeks thereafter that he had made a deed, conveying the property absolutely to his niece; that he asked her where the deed was and she told him it was at the recorder's office and that it was an absolute deed to her (Rec., pp. 18, 19, 23). This suit was not commenced until August 31, 1912 (Rec., p. 1). The plaintiff further testified:

"The reason I waited so long before trying to recover the property was that I just left to [let it] go on from time to time, thinking it would come out all right. During these years I lived at the house as I always did until May, 1912" (Rec., p. 23).

The plaintiff further testified:

"Before she [referring to Mrs. Sullivan] asked me to deed the property to her in trust she asked me to deed it to her absolutely, but I refused. This was

at the house in question in the dining room. She asked me quite a few times, but nobody was present. At some of the conversations I had with her on the subject, Mr. James Springman, former deputy marshal, was present. He was present very often. When he was there she asked me to deed the property to her in trust and I refused. She then turned around and asked Mr. Springman if he would not try to get me to do so. Springman was present probably a half dozen times when she talked about this matter. Springman is now dead" (Rec., p. 20).

And, further, that at the date of the execution of the deed the defendant's married name was Stahl. "Her husband was John Stahl, who died in February, 1910" (Rec., p. 18).

The defendant, in testifying to the conversation that occurred between Mr. Killigan and herself, in which he voluntarily stated that he intended to deed the property to her, said: "And if my husband [referring to John Stahl] was living he would be a witness, but he is dead and can't speak for himself" (Rec., p. 37). She also testified that Mr. Stahl died February 13, 1910 (Rec., p. 34), which was about ten and one-half months after the execution of the deed.

The will of Mr. Killigan is dated October 12, 1908, and Mr. Springman is named therein as executor (Rec., p. 61). Mr. Killigan testified that Mr. Springman suggested to him that he engage Mr. Archer to draw the will (Rec., p. 22).

Dr. Roman, who was one of the witnesses to the will, testified that Mr. Springman was present when Mr. Killigan executed his will (Rec., p. 47).

The defendant testified that the plaintiff never wrote nor asked her to deed the property back to him, nor did he ever ask her to execute a declaration in trust; that he never gave her any intimation, verbal or written, that he was going to file suit against her; that the filing of this suit was a surprise to her (Rec., p. 41).

By waiting until after the deaths of James Springman (a friend of the plaintiff, according to the plaintiff's own testi-

mony—Rec., p. 22—and whom plaintiff selected as executor of his will—Rec., p. 61) and of John Stahl, both of whom, as the record abundantly shows, were important and competent witnesses on behalf of the appellant, before filing this suit, and in virtue of the ruling of the lower court sustaining the objections of the plaintiff to any testimony by Mr. Archer, the plaintiff has been able to obtain a decree which not only vacates a solemn instrument conveying real estate, but which also convicts the defendant of practicing the grossest fraud and deception upon him.

The rule as to laches is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties (*Hammond vs. Hopkins*, 143 U. S., 224). Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced—an “inequity founded upon some change in the condition or relations of the property or parties (*Galliher vs. Cadwell*, 145 U. S., 368; *Quirk vs. Liebert*, 12 App. Cas., 394).

It is a material circumstance that the claim is not made until after the deaths of those who could have explained the transaction. *Mackall vs. Casilear*, 137 U. S., 566; *Morris vs. Haggin*, 136 U. S., 386; *Chase vs. Winans*, 59 Md., 475; *Preston vs. Horwitz*, 85 Md., 171.

In *Harwood vs. Railroad Co.*, 17 Wall., 78, a delay of five years on the part of stockholders in a railroad company in bringing suit to set aside judicial proceedings, regular on their face, under which the railroad property was sold, was held inexcusable. In *Brown vs. County of Buena Vista*, 95 U. S., 157, a county was held barred by its laches from

maintaining at the end of seven years a suit to set aside a judgment fraudulently obtained against it; and that, too, though it did not affirmatively appear that the supervisors of the county had knowledge of the existence of the judgment till about twenty months before the commencement of the suit.

If, at the hearing in equity, a case appears liable to the objection of laches, relief will be refused (*Richards vs. Mackall*, 124 U. S., 183). The chancellor may justly refuse to consider a plaintiff's case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations in his answer (*Badger vs. Badger*, 2 Wall., 87, 95).

In *Crutchfield vs. Hewett*, 2 App. Cas., 373, this court held that where laches are not relied upon as a defense a court of equity may raise the question of its own motion. See, also, *Sullivan vs. R. R. Co.*, 94 U. S., 806.

“Where, from delay, any conclusion at which the court may arrive must at best be conjectural, and the original transactions have become so obscured by lapse of time, loss of evidence, and death of parties or witnesses as to render it difficult if not impossible to do justice, the plaintiff will, by his laches, be precluded from relief, and it is not even necessary that the court should be satisfied that the original claim was unjust or has been satisfied.” 18 Am. & Eng. Enc. Law, 2d ed., p. 105.

In *Levis vs. Kengla*, 8 App. Cas., 238, the court denied the relief sought by the plaintiff on the ground of his laches, it appearing that three very important witnesses for the defense had died during the time the plaintiff delayed the bringing of his suit. In that case the plaintiff alleged that a foreclosure of a deed of trust on certain real estate owned by him was “an informal sale,” and that he had a verbal agreement with the defendant, who bid in the property, to reconvey to him in a certain contingency, or to hold the

property in trust for the use and benefit of the plaintiff. This court also held that the trust alleged was an express trust created by express agreement to that effect by the parties themselves; that the statute of frauds could not be avoided or evaded by thus designating an agreement as a trust.

The testimony of the plaintiff himself is that for over three years after he admits that he knew that the deed executed by him conveyed the fee-simple title to his niece he, his niece and her family occupied the premises over the store as their joint home, upon an amicable basis. His attempted explanation for his inequitable delay is: "The reason I waited so long before trying to recover the property was I just left [let it] go on from time to time, thinking it would come out all right" (Rec., p. 23).

In the case of *Lane & Bodley Co. vs. Locke*, 150 U. S., 201, the court says:

"Courts of equity, it has often been said, will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them. The plaintiff's excuse, in this instance, that he preferred for prudential reasons to receive a salary from the defendant rather than to demand a royalty, is entitled to a less favorable consideration by a court of equity than if his conduct had been that of mere inaction."

ASSIGNMENTS III, IV AND V.

The testimony adduced on plaintiff's behalf is wholly insufficient to justify the decree.

Assignments 3, 4 and 5 relate to the insufficiency of the plaintiff's testimony, and, therefore, challenge the correctness of the decree. These assignments will be considered together.

In this connection, it must be borne in mind that this case involves an attempt to set aside a deed to real estate,

on its face duly prepared, duly executed, acknowledged and recorded.

It is an attempt to set aside a muniment of title to real estate which will not be done unless upon clear and convincing evidence. A deed is an instrument of too much dignity to be set aside upon loose and general statements as to the mental incapacity of the grantor, especially where the proof consists in the unsupported statements of the grantor himself (*O'Connell vs. Koob*, 16 App. Cas., 168). If any other rule were to be permitted to prevail, there would be no security in land titles, and every owner of real estate would be at the mercy of a grantor who might claim that at the time of the conveyance he was incapacitated by drunkenness or otherwise from making a deed, but was entirely competent on the stand to testify in his own behalf against the deed.

When a deed regular in appearance and bearing the genuine signature of the grantor is attacked, the evidence to impeach it should be clear and convincing (*Insurance Co. vs. Nelson*, 103 U. S., 548).

In a suit to set aside a deed of trust signed by husband and wife, the acknowledgment of which was certified as required by law, it was held that the certificate must stand as against a mere conflict of evidence as to whether the wife had willingly signed, sealed and delivered the deed (*Young vs. Duvall*, 109 U. S., 573).

A deliberate deed is of too much solemnity to be brushed away by loose and inconclusive evidence (*Howland vs. Blake*, 97 U. S., 626; *Moore vs. Crawford*, 130 U. S., 122).

The burden of proof to show fraud and undue influence, sufficient to set aside the deed, is upon the plaintiff (*Madre vs. Gaskins*, 39 App. Cas., 19).

Approaching the consideration of the evidence in this case, we find the situation to be as follows:

Killigan filed his bill to vacate this deed, alleging (1) that he was mentally incapable of making a valid deed or

contract. There is no proof whatever to sustain this charge. Killigan himself (Rec., p. 22) stated, when on the stand, that he was perfectly vigorous and healthy in body, and that his mind was as clear as it ever was, excepting during periods of intoxication. In his bill he alleges (2) that he was persuaded to make the deed by undue influence and persuasion on the part of Mrs. Sullivan when he was without independent advice in the matter. It will not be pretended, we believe, that there is any evidence to show that Killigan was forced to sign the deed, or that, by any act or threat of Mrs. Sullivan, he was put *in terrorem* or that he was so coerced and importuned that his mind was *in vinculis* so that he could not resist the pressure that was brought to bear upon him, and that therefore the deed was not his free and voluntary act. Yet, by all the authorities, the proof must reach that degree (*Conley vs. Nailor*, 118 U. S., 127). The only shadow of evidence upon this point is that Killigan says that Mrs. Sullivan asked him to deed the property to her in trust (Rec., p. 18); that on the day the deed was signed he had been drinking for some days and really did not know what he was doing. He further states that he sobered up three or four days after he had signed the deed. Killigan also alleges in his bill (3) that he was the victim of active fraud and misrepresentation on the part of Mrs. Sullivan, in stating that the instrument was in fact a deed in trust, whereas in truth it was an absolute conveyance. It will be observed that these two claims are entirely inconsistent. It is first alleged that when the deed was signed, Killigan was intoxicated and did not know what he was doing, and in the next place, it is alleged that he did sign a paper, but was deceived as to its nature and contents. The bill does not seek to reform the deed, or to have the court declare a trust in favor of the plaintiff, but seeks to have the deed vacated and set aside altogether.

Whether the alleged agreement was an agreement to reconvey in a certain contingency, or an agreement to hold

the property for the use and benefit of the plaintiff, it was equally obnoxious to the Statute of Frauds (*Levis vs. Kengla*, 8 App. Cas., 238).

The real questions, therefore, to be determined are only two. Was Killigan so intoxicated when the deed was signed and delivered that he was incapable of appreciating the act he was performing? Putting aside every presumption with which the law surrounds the integrity of this instrument, we have at this point the naked and unsupported testimony of Killigan alone. His testimony is full of contradictions, evasions and denials, and the mere reading of his testimony, in chief and upon cross-examination, will convince the court that his statements are altogether unreliable and unworthy of credence.

He produced in his behalf but four other witnesses—Katherine Killigan, Josephine Killigan, Lawrence Hufty and Edward J. Sullivan, the first two being sisters of Killigan and the last named being Mrs. Sullivan's brother. Both Katherine Killigan and Josephine Killigan confessedly know nothing as to the execution of the deed. Katherine Killigan was asked specifically (Rec., p. 27) as to her brother's condition on March 31, 1909, and stated that she knew nothing about it, because she had stopped going there. Josephine Killigan stated (Rec., p. 28) that she had visited her brother's house only two or three times since his wife's death, and does not pretend to know anything of his condition at the time the deed was executed.

Killigan testified that his niece did not treat him as well after he signed the deed as she did before, and "things became so unbearable that I had to leave there" (Rec., p. 19). The defendant contradicts this testimony (Rec., p. 39).

But, assuming for the sake of argument, that there was a change in conditions, relations or feelings between Mrs. Sullivan and her uncle, after the deed was signed and after her second marriage, and he had reason to repent of his former generosity, the court will not grant relief to the plain-

tiff on these grounds, nor give weight to them in deciding the case (*Warner vs. Jackson*, 7 App., 216; *O'Connell vs. Koob*, 16 App. Cas., 170).

Mr. Lawrence Hufty, the notary who took Mr. Killigan's acknowledgment to the deed, and whose duty it was to see and to know that it was the voluntary act of the grantor, and to know that the grantor understood what he was doing, undertakes to appear as a witness against the integrity of his own official act, but from his own testimony (Rec., p. 30) it appears that Killigan was not drunk, and that he seemed to know what he was doing. He says (Rec., p. 30): "I knew what I was doing, and felt that I was doing my duty. I explained what this thing was to this man. I told him it was a deed to that property; a conveyance to Mrs. Stahl. He seemed to know and understand it."

Dickerson vs. Evans, 84 Ill. Rep., 451, 454, was an action of ejectment. Both parties claimed from the same source. The case turned upon the validity of a deed from an aged and illiterate woman to her son. The notary testified that John, the grantee was hurrying him to act, and the notary replied "that he was not there to make contracts, but simply to confirm whatever you two agree on. Then John urged his mother to hasten." The notary read and explained the deed to her and told her that if she signed it she must do so of her own free consent.

In its opinion, the court says, page 454:

"It is true, the notary did state to one of defendant's attorneys that in his opinion the defendant did not know what she deeded when he took the acknowledgment, and to Mrs. Whiting, that John's statement had deceived her, and that his (the notary's) explanation was such as to mislead her. This may all be so, yet it does not alter the aspect of the case. The law raises the presumption she did know and understand what she was doing. It was her duty to know it and she must be held to the deed. If, in such a case as this, with such testimony, conveyances of land are to be declared invalid and made in fraud, then there can be but little security in paper titles."

The only other witness for Mr. Killigan is Edward J. Sullivan, who states generally that for a year and a half after his wife's death Killigan was certainly drinking, but even this witness, extravagant as his statements are, does not pretend to say and could not possibly have known what was Killigan's condition as to sobriety when the deed was executed and delivered.

As opposed to this testimony, we have the following undisputed facts:

Mr. Killigan acquired the property in dispute about twenty-five or twenty-seven years ago, and conducted a successful and prosperous business for many years, but every six or ten months he would go on a spree (Rec., p. 21); on account of this habit, he conveyed the property to his wife in fee without reservation or condition, because he was afraid to trust himself. This was ten years before his wife's death, knowing that his wife would protect him. When Mrs. Killigan died, she devised the property back to him. About this time he began to drink harder than before. He was devoted to his wife (Miss Josephine Killigan's testimony, p. 29), and it seemed to break his life in half when she died. He gave up his business and everything else. He announced that he never intended to work any more. Mrs. Stahl, a young woman, and his favorite niece, took up his household affairs just as his wife had done (Rec., p. 21). Killigan had every confidence in her (Rec., p. 22). Apparently he was satisfied to live in this house, to be provided for by his niece and to remain in idleness for the balance of his life. His ambition was gone, his wife was dead, he was childless, his only blood relatives, whatever may have been the reason, rarely visited him. He had no ties except his favorite niece, whom he had known since her birth and who was, as he himself states (Rec., p. 22), his favorite. What is more natural than that he should desire to guard against his own improvidence by withdrawing his property from the consequences of his own reckless habits?

He was not indebted to anybody. There was no reason why he should not make a voluntary conveyance to his niece for her benefit as well as for his own protection.

He had previously made a will giving substantially all his property to Mrs. Sullivan (Rec., p. 61), at a time when there was no question of his competency to make the will. Dr. Roman (Rec., p. 47) and Mr. Unhau both so testify (Rec., p. 55).

Mrs. Brown (Rec., p. 49), wholly disinterested, gives important testimony as to Mr. Killigan's disposition, the regard that he had for his niece, and his regret that he had been influenced by bad advice in attacking the deed which he had made to her. To the same effect is the testimony of Police Officer Sweeney (Rec., p. 51). Mr. Killigan told Sweeney that he had deeded or willed the property to his niece, and stated that there was nobody in the world like Ada (Rec., p. 51).

Added to all this, the clear, explicit and convincing testimony of Mrs. Sullivan herself, and the preponderance of evidence in favor of the deed in dispute, are, we respectfully submit, overwhelming.

In October, 1910, the defendant gave a trust for \$1,800 upon the property to the German-American Association, the same being a straight three years' loan, and the original encumbrance and accumulated interest were paid (Rec., p. 38). Killigan testifies that he knew that his niece intended to make the new trust, knew when the same was done (Rec., p. 20); that he knew she had the absolute title to the property "and that she was borrowing money upon it. I don't know that I told Mr. Bergmann or anybody else connected with that society that I had given this property to Mrs. Stahl through her fraud" (Rec., p. 24). "I don't know that I told these people that I was the real owner of the property" (Rec., p. 24).

Mrs. Sullivan treated the property as her own. The plaintiff himself testifies that she managed the property, collected

the rents and made no accounting to him therefor (Rec., p. 20).

In 2 Pom. Eq. Jur., section 965, the author, in announcing the principles applicable to acquiescence and lapse of time, among other things, says:

“When a party, with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable.”

Numerous authorities are cited in support of this text.

As to the allegation in the bill that Mrs. Sullivan had committed a fraud upon Mr. Killigan, there is not the slightest foundation for such a charge beyond the vague and uncertain statements of the plaintiff himself, which are wholly insufficient to overcome the presumption in favor of the deed, without regard to the great mass of testimony affirmatively shown in its favor.

It is respectfully submitted that the decree below is erroneous, and that it should be reversed, and the case sent back with directions to dismiss the bill of complaint.

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OCT.-30.-1913

Henry W. Hodgson
Clk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1913.

No. 2587.

MARY A. SULLIVAN, APPELLANT,

vs.

THOMAS J. KILLIGAN, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

CHARLES LINKINS,
CHAPIN BROWN,

Attorneys for Appellee.

SUBJECT INDEX

A.

	Page.
1. Issues raised by the pleadings.....	1
2. Review and argument of the facts.....	2-15
3. Appellant's testimony contradicts itself.....	15-17
4. Argument:	
Appellant's assignment I:	
The question of exclusion of Archer as a witness not before this court.....	17-21
Appellant's cases on privilege not in point.....	21-23
Appellant's assignment II:	
The defense of laches not justified.....	23-24
Appellant's assignments III, IV, and V:	
Testimony on appellee's behalf is suffi- cient to justify decree of lower court....	24-30

B.

TABLE OF CASES CITED

Alexander's Ch. Practice (p. 83).....	18-19
Allore <i>vs.</i> Jewell (94 U. S., 506).....	24
Barnes <i>vs.</i> Barnes (20 D. C., 479).....	27, 30
Barrow <i>vs.</i> Reab (9 How., 366).....	19
Bowen <i>vs.</i> Clark (3 Fed. Cases No. 1721; 1 Bliss., 128).....	27
Brogden <i>vs.</i> Walker (2 H. & J. Md., 283) ..	24, 25, 26, 29, 30
Bryson <i>vs.</i> Petty (1 Blands Ch., 182).....	18-19
Butler <i>vs.</i> Mulvihill (1 Bligh., 137; 4 Eng. Re- print 49).....	27
Chicago I. L. R. Co. <i>vs.</i> McGuire (196 U. S., 132)	19
Clark <i>vs.</i> Harmer (9 App., 1).....	18
Clarkson <i>vs.</i> Kitson (4 Grant Ch., U. C., 244).....	27

INDEX.

ii

	Page.
Code, D. C. (sec. 1061).....	18
Conley <i>vs.</i> Nailor (118 U. S., 127-133).....	27
Cyc. (vol. 40, p. 2365).....	23
Daniell's Ch. Pl. & Pr. 2nd ed. (p. 1083).....	18-19
Darlington <i>vs.</i> Turner (24 App. D. C., 573).....	23
Diggins <i>vs.</i> Doherty (4 Mackey, 172).....	15, 27, 30
Eaton <i>vs.</i> Brown (20 App. D. C., 453).....	19
Ency. of Pl. & Pr. (vol 12, p. 851).....	23
Fontain <i>vs.</i> Ravenel (17 How., 369).....	19
Fowler <i>vs.</i> Lansing (164 U. S., 225).....	19
George <i>vs.</i> Richardson (Gilm., Va., 320).....	27
Gibson <i>vs.</i> Jeyer (6 Ves., 275).....	24
Griffith <i>vs.</i> Godey (113 U. S., 89-95).....	24
Gulf, etc., R. R. Co. <i>vs.</i> Gibson (42 Tex. Civil App., 306; 93 S. W., 469).....	21
Harding <i>vs.</i> Handy (11 Wheat., 103).....	27
Howlett <i>vs.</i> Eagan, decided by general term.....	27
Hunt <i>vs.</i> Blackburn (128 U. S., 464).....	21
Hume <i>vs.</i> Cook (16 Grant Ch., U. C., 84).....	27
Mansfield <i>vs.</i> Watson (2 Iowa, 111).....	27
McGregor <i>vs.</i> Bolton (12 Grant Ch., U. C., 288).....	27
Missouri P. R. Co. <i>vs.</i> Fitzgerald (160 U. S., 556)....	19
Morrow <i>vs.</i> Jones (106 U. S., 466).....	19
Murray <i>vs.</i> Hilton (8 App. D. C., 281).....	27, 28
Peroni <i>vs.</i> Corrigan (47 N. J. Eq., 135; 20 Atl., 218) 27, 28	
Rogers <i>vs.</i> Ritter (12 Wallace, 317).....	19
Trust Co. <i>vs.</i> Darling (21 App. D. C., 102).....	23

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BRIEF ON BEHALF OF APPELLEE.

Issues Raised by the Pleadings.

The grounds alleged and relied upon in the bill of complaint for setting aside the deed given by the plaintiff, Thomas J. Killigan (appellee), to the defendant, Mary A. Sullivan (appellant), are, namely: (1) mental incapacity on the part of the grantor Killigan at the time of the execution of the deed; (2) undue influence exercised by the said Mary A. Sullivan (appellant) upon Thomas J. Killigan (appellee); (3) absolute failure of consideration.

There are other collateral questions which were included in the case, namely: (a) active fraud on the part of Mary A. Sullivan (appellant) in representing to Killigan (appellee) that the conveyance to her of the property was to be in trust and not an absolute deed, and (b) after knowledge came to Killigan (appellee) that he had signed an absolute deed it was agreed by Mary A. Sullivan (appellant) that she would hold the property in trust for his benefit.

Review and Argument of the Facts.

The facts appearing in the record in support of the above-mentioned contentions of the appellee, briefly stated, are as follows:

Thomas J. Killigan, the appellee, purchased the property in question about twenty-seven years ago. The property is now known as 1713 Seventh Street Northwest. The property at the time he purchased it was unimproved. At that time he was engaged in the heating and tinning business, and was married, and he had been for about six or seven years when he purchased the lot. He paid for the land and built the house now on it out of his earnings by payments extending over a long length of time (Rec., p. 18). After he built the house upon the property, he used the front first floor room as a store for conducting his heating and tinning business, and he and his wife lived in the room in the rear of the store and in the second floor of the building. The bill alleges that the property is worth about \$14,000 (Rec., p. 2), and the answer of the appellant places the value of the property at not less than \$12,000 (Rec., p. 7). The appellee Killigan and his wife jointly occupied the property until the death of his wife, about six years ago (Rec., p. 18), and then the appellee continued to occupy the property until about three months prior to the filing of the bill of complaint, which was in the month of May, 1912, at which last-mentioned date he went to live with his two sisters, Katherine and Josephine Killigan, at their home, 723 Third Street Northwest, Washington, D. C., and has been living with them ever since (Rec., pp. 22, 27, 28). During the lifetime of his wife, the appellee "was in the habit of sometimes going on sprees most every six or ten months; once or twice a year," and the habit continued to grow on him, but between times he attended to business capably and successfully (Rec., p. 21, appellee's testimony). But after his wife's

death, which occurred on June 21, 1908 (Rec., p. 18), and which was a severe blow to him he became greatly worried and for about a year and a half thereafter (Rec., pp. 31 and 33, Edw. J. Sullivan's testimony) took to drink to excess. The witness Umhau (Rec., p. 56) testifies, "I fix the time as a week or two or three weeks, because it was a short while after his wife's death and he was on a spell of drinking then for quite a little while. That is how I fix the time. He was pretty well broken up at the time. He was worried a whole lot, and no doubt that caused him to drink a good deal" (Rec., p. 56). To the same effect is the testimony of the appellee's sister, Josephine Killigan (Rec., p. 29), and the appellant's brother, Edward J. Sullivan (Rec., pp. 31 and 33). Even the appellant testifies in this regard (at Rec., p. 35) referring to his wife's death, as follows: "He said he was worried and just took to drink to drown his trouble. . . ." While the appellee Killigan was in this condition, he executed a deed of the property in question to the appellant and which was the deed which was set aside by the lower court.

The surrounding circumstances which led up to the giving of this deed, as shown by the record of the evidence, are as follows:

The appellee's, Killigan's wife, was sick about five months in her last illness and during that time his elder sister, Katherine, attended her. She came to the house and stayed with his wife until she died, covering a space of about three or four months. While she was there she nursed his wife, and at her death, helped the undertaker to wash her and lay her out (Rec., p. 21, appellee's testimony; p. 27, Katherine Killigan's testimony, and p. 28, Josephine Killigan's testimony). During that time the appellant, who was a niece of appellee's wife, in connection with appellee's said elder sister, also attended his wife, and was also at his house at the time of his

wife's death. After the death of his wife, his sister, Katherine, returned to her own home, 723 Third Street Northwest. But the appellant, after his wife's funeral, although the appellee testifies that he did not invite her to come and live with him, came and stayed there without any suggestions from the appellee, and was immediately taken ill (after the funeral) and went to bed (Rec., p. 21, appellee's testimony). The appellant, in her testimony, admits the above-mentioned facts, except that part to which the appellee testifies that he did not invite her—that she stayed there without invitation (Rec., p. 35). Prior to the appellant being taken sick, however, and before appellee's wife's body was taken out of the house, the appellant went with the appellee to the insurance company in which he had a life insurance policy of either \$5,000 or \$2,000 on his life (appellee says it was a \$5,000 policy, Rec., p. 21) and at that time had him assign the policy of insurance to her (Rec., pp. 43, 44, appellant's testimony). The appellant, with her then husband and infant child, continued to live in the home of the appellee, and on October 12, 1908, the appellee made a will with the appellant as the residuary legatee and devisee therein of all of his property, less two bequests to his two sisters of \$1,000 each (Rec., pp. 61, 62). This will was executed by the appellee, under the following conditions:

The appellant knew a man by the name of James Springman, who had attended to some business matters previously for her and who was her business adviser (Rec., p. 32, Edward J. Sullivan's testimony), and he, Springman, engaged James B. Archer to draw a will for the appellee, which the said Archer did and brought the will so drawn to appellee's house on the night of October 12, 1908, already prepared for execution (Rec., p. 36, appellant's testimony). The witnesses to this will were Dr. Frederick O. Roman and Christian F. Umhau.

The witness, Christian F. Umhau, testifies (at Rec., p. 56), as to how he became a witness to this will, in effect, as follows:

“A lady came over and called me and told me that *Uncle Tom* was going to make a will, and for me to come over and witness it. My recollection is that it was a lady, but I just couldn't make out. She just came in and hollered in the door, ‘Uncle Tom wants you to come over and witness a will,’ and that is all I know. It was a niece of Mr. Killigan, but who it was, I really never paid any attention to it at the time. It came so unexpectedly that I paid no attention to it. I think it was one of the nieces, but I couldn't be quite positive about it. The expression was ‘Uncle Tom wants you to come and witness a will.’ It was a lady and not a man” (Rec., p. 56).

Prior to this testimony, which was given by the witness Umhau, the appellant had testified explicitly to all the persons who were present at the execution of this will (Rec., p. 36), who were the appellant, Mr. Umhau, Doctor Roman, Mr. Springman, Mr. Archer, and the appellee. When this testimony was given by the witness Umhau (whose place of business was immediately across the street from appellee's home), that it was a niece of the appellee and testator, the appellant was present and yet there was no cross-examination by her counsel of the witness Umhau, to relieve the appellant from the inference from all the facts that had been testified to that it was she, the appellant, who sought the witness Umhau, to the will of which she was the residuary legatee and devisee.

The testimony further shows that after the will was signed and executed, that it was delivered to her (appellant), and not to the appellee (testator), by Mr. Archer, and that she kept it in her bureau drawer in her own room with other papers belonging to herself (Rec., p. 36,

appellant's direct testimony; page 43, appellant's cross-examination).

The testimony of the appellant further shows that the appellee was drinking when he made this will (Rec., p. 43, appellant's testimony).

In reference to how this will was made, the appellee himself testifies (Rec., p. 22), as follows, he having first confused the will upon which he was being then cross-examined with a will which had been made for him by Mr. Percival Brown, in his wife's lifetime, in favor of his wife, but after understanding the matter on which he was being then cross-examined, namely, the will made by Mr. Archer, and produced and introduced in evidence by the appellant, the appellee testifies in these words:

"He (Springman) suggested that I make the will. In that will I left my sisters \$1,000 each, everything else to Mrs. Stahl absolutely and in fee, and made Mr. Springman executor. I suppose I knew what I was about when I made this paper. That is, I don't know as I did. I left so little to my own sisters because she (appellant) influenced me. She knew I was drunk and I was easily persuaded. When I stated I made this will of my own free will, I take it back; I withdraw that statement. Maybe Mr. Springman suggested the making of the will; I can not remember. My niece did persuade me. I happened to name Mr. Springman as executor because he was in the habit of visiting the house. I mean to say, he visited Mrs. Stahl about once a week or every ten days. I did not leave my sisters more than I did because I was influenced by Mrs. Stahl. She said she did not want me to visit my sisters. I am in good health now, perfectly vigorous and healthy, and my mind is just as clear as it ever was and always has been except during the periods of intoxication."

At page 26 of the record, the appellee testifies as follows:

"Mrs. Sullivan asked me to make a will in her favor on three or four occasions at the Seventh Street property. She never asked me to make a will in favor of my sisters. I wouldn't have made a will in Mrs. Sullivan's favor if she had not asked me to do so. I wouldn't have conveyed this property to her in trust if she had not asked me to do so. (Cross-examination) I certainly do mean to suggest that Mr. Springman came to my house for the purpose of seeing my niece and not to see me. I can't tell whether he had any improper motive in doing so. I don't know as I had any objections to his coming. I didn't make any objection to his visits. I had known Mr. Springman five or six years running back from the present time. I don't think he has been dead that long. I knew him twenty years ago. He was a friend of mine. Mrs. Stahl's husband was living at that time, but her husband was out when he (Springman) came there."

After the making of this will the appellant discouraged the sisters of appellee from going to the house, as appears from the testimony of his sister, Katherine Killigan, where she testifies (at Rec., p. 27):

"Mrs. Stahl [now Mrs. Sullivan, the appellant] objected three times to my visits. I went up there and could not get in. I could see her from the front door back into the kitchen, but she wouldn't answer the door, and then one time I went there and there wasn't anybody in but my brother, and I opened the door and went right back, and he was so drunk he did not know me or my sister at all. Before we came away, she came in and I said, 'Ada, what in the world is the matter with Tom? How much whiskey did you give him? He looks as though he is going to die.' She answered, 'No, indeed, he will be all right. I give him from a quart to a half gallon a day.' Q. Do

you remember what condition he was in on the 31st of March (1909) or about that time? A. No, I don't know anything about that because she treated us with such contempt that I stopped going out there. He would always come to the house when he was on these drunks. He would come down there very sick and I would put him to bed and take care of him. We were always very friendly."

This testimony is borne out by appellee's other sister, Josephine Killigan, both on direct and cross-examination (Rec., pp. 28, 29).

This testimony is further borne out by the testimony of appellee (at Rec., p. 21), as follows:

"Since my wife's death my relatives have treated me all right. They called to see me and Mrs. Stahl would not let them in when I was sick. They told me she would not let them in. I asked Mrs. Stahl about it and she told me 'No,' she did not want them there. That was after my wife died."

This testimony is not denied by the appellant.

It is thus seen the appellant dissuaded the appellee's sisters from visiting him at his house after having obtained the execution of the will in her favor, as appears from the testimony above quoted, and she, her husband, John Stahl, and child, continued to live with him, appellee, at his house, and on the 30th of March, 1909, which was about five months after obtaining the will from him, she (according to her testimony) caused a deed from him to her to be drawn under the following circumstances as testified to by her (at Rec., pp. 36, 37) in answer to questions by her own counsel, as follows:

"Q. Will you please state in your own way just how that deed came to be executed? A. Why, Uncle Tom said to me one day—I said, Uncle Tom, I am awfully afraid that your sisters some day are

going to give me trouble. He said, 'What do you mean, Ada?' I said, Uncle Tom, they are your sisters and I am only a niece to you by marriage; it is natural that they will feel nearer to you, and would want what you have. And he said you oughtn't worry about that. I said, I would rather not have anything if I had to have trouble over it. He said, I am going to deed that property to you, and then they won't give you any trouble. And I said, how can't they give me trouble? He said, no, a deed can't be broken. When I once deed it to you it will not be broken."

Admitting only for the sake of argument that her testimony of the transaction is correct, it is apparent from the above testimony out of the mouth of the appellant herself that she suggested, in the skillful way above shown, to the appellee, that he deed the property to her, because she expresses to him a fear of trouble with his sisters and that the will would be broken. And this is apparent from the further testimony that she gives as to the manner in which the deed was obtained. The appellant then testifies (Rec., p. 37) that she said to the appellee "some day when you (appellee) want to and you feel like going I will go with you to Mr. Archer's office," and pursuant to this suggestion from the appellant to the appellee she says that they went down to Mr. Archer's office on a Monday and that the deed was drawn by Mr. Archer (Rec., p. 37), and that she paid Mr. Archer for his services in writing the deed \$7 (Rec., p. 38). It then further appears from her testimony that Mr. Archer sent a Mr. Hufty, a notary public, with the deed to appellee's house to have him execute it (Rec., p. 37); that when he, Hufty, came to the house the appellee was out; that appellant informed Mr. Hufty that the appellee was not at home, but that he, appellee, generally comes back to eat his breakfast about 10 or 11

(Rec., p. 37); that Hufty told her that he would probably catch him then (Rec., p. 37); that when he, Hufty, came back, the appellee had eaten his breakfast and laid down on the lounge when Mr. Hufty came in (Rec., p. 38). The appellant then testifies as follows: "I woke Uncle Tom up and told him there was the notary public to witness the deed" (Rec., p. 38). It will be observed that this was 10 or 11 o'clock in the morning, and the appellee was asleep and the previous testimony shows that he had been out of the house that morning and had come back and gone to sleep. It is apparent from this and other testimony in the case, especially his uneven, slanting, and trembling signature to the deed, that this was a drunken sleep on the part of the appellee. The witness Hufty, the notary public, testifies (Rec., p. 29) regarding appellee's condition at the time he signed the deed as follows: "Q. Please state, Mr. Hufty, if you noted whether or not Mr. Killigan was under the influence of liquor? A. Well, Mr. Killigan had been drinking," and on cross-examination by appellant's counsel (Rec., p. 30) he testifies as follows: "Q. Well, you say he wasn't sober? A. Apparently not. He appeared to have been drinking." In this connection the appellee (Rec., p. 19) testifies that he had been drinking very hard that day and for some days previous. That he was too much under the influence of liquor. That on the day the deed was signed, he could not sleep and went out about half past four in the morning of that day and got a drink at the Thyson House. That appellant had left some whiskey in a bottle on the sideboard for him. At record page 25, he testifies that he drunk all of the liquor out of a bottle he got the night before and that the bottle she brought in was brought in by her on the morning before he signed the deed.

In corroboration of this testimony of Mr. Hufty, the appellant testifies that the appellee was lying down on a

couch in the back room back of the store and was asleep, and that the appellant called him and got him up, and that the appellee signed the deed, and the witness Hufty thinks that the appellant got the pen and ink, but he don't remember where she got it from (Rec., p. 29).

It will thus be seen that the testimony of the appellant and the notary Hufty is all of the testimony regarding the actual signing of the deed by the appellee, for as hereinafter shown by the testimony of the appellee, he, the appellee, was drunk at the time, and even if his condition was such at the time he signed the deed to warrant a belief that he knew of his having signed the deed, it is certainly proven by all of the other evidence that he supposed he was only signing a deed in trust to her for his sole benefit.

The sworn bill of complaint alleges (Rec., p. 2) that the appellant had urged and importuned the appellee to convey the property to her to be held by her as trustee for the appellee and for no other purposes and suggested to the appellee, among other things, as a reason for so doing, his habits of intoxication, and that if he did so she would manage and control and collect the rents and profits thereof and account to him therefor. That these suggestions and requests were made to the appellee by the appellant on several occasions prior to the 30th of March, 1909, and that the appellant suggested that she being a niece of the appellee's former wife, he should have entire confidence in her (Rec., pp. 2 and 3). That the appellee had never agreed to comply with the requests and suggestions and importunities of the appellant, but the same had impressed him (Rec., p. 3). These allegations in the bill of complaint regarding the suggestions and requests made by the appellant to the appellee to deed the property to her in trust are borne out by the appellant's own testimony, where she says (Rec., p. 37): "Uncle Tom had talked to me about deeding the house to me on

two or three occasions." And it is apparent from the testimony of the appellant already quoted that the two or three occasions when the deed was talked about must have been upon the suggestions of the appellant herself, because she says (Rec., p. 36) that she, appellant, was afraid of having trouble with the will and that she brought that fact to his attention.

The allegation in the bill that no adequate consideration whatever passed from the appellant to the appellee for the execution of said deed, but the consideration, if any, was grossly inadequate and has wholly failed (Rec., p. 3), is fully supported by the admissions in the appellant's answer and the evidence. The appellant in her answer admits (Rec., p. 8) that no money consideration passed from her to the appellee for the execution of the deed, and the only consideration that she attempts to imply was made by her, was for services in attending the appellee either before or subsequent to the making of the deed (Rec., p. 9). The appellant could have rendered no material service to the appellee in attending him, because she had a husband and infant child, who were occupying appellee's house with her and who necessarily must have required the major part of her attention. In addition to that, about a year after she had obtained the deed in the manner hereinbefore shown, by the evidence, she bought a cigar store and she testifies (at Rec., p. 39) that this store required her constant attention from 5 o'clock in the morning to 1 o'clock the next morning and her attention at the store was kept up until the appellee was compelled to leave on account of the most unsatisfactory condition at his home and for lack of sufficient food to eat (Rec., p. 23). This fact is also testified to by Edward J. Sullivan, the brother of the appellant (Rec., p. 31). After the death of appellant's first husband (Stahl) she marries again and brings into the appellee's home a man, whose relations with the

appellee were unpleasant (Rec., p. 24). After that time (about February, 1912) conditions became worse and the appellee left in May or June following (Rec., p. 19).

But it is fully shown by the evidence that there never was intended between the parties to be any real consideration for the deed, but that the consideration was to be simply nominal, and that it was mutually intended between the parties that if the appellee conveyed the property to the appellant, it should be, and was intended, mutually between them, to be only a deed in trust for his benefit. The appellee alleges in his bill that when the suggestion was made to him by her that he convey her the property in fee simple, that he positively refused to do so and that she then asked him to convey it to her in trust and that he did not consent to do it, but was impressed by the suggestion, and that the only suggestion made by her that received consideration by him was the request that he convey the property to her in trust for his benefit. The deed was then made through her instrumentality, while he was excessively under the influence of liquor, and after he sobered up and learned from a conversation with her that the deed was an absolute one, the bill alleges (Rec., p. 4), and he supports the allegation by his testimony (Rec., p. 25), that she agreed she would hold and was then holding the property for him in trust, although the deed to her was an absolute one, and that it was better for him that it should remain in that condition and that she would convey the property as he would direct. That he then had confidence in her and still continued to have confidence in her that she would carry out this trust, until a short time before this suit was instituted, when he made a demand on her to convey the property to him and she refused (Rec., pp. 21, 22, 25).

The allegation in the bill that the property was held by her in trust is supported by the answer of the appellant (6th paragraph, Rec., p. 8), where she admits that

under his direction she borrowed \$1,800 upon the property, as alleged in the sixth paragraph of the bill of complaint (Rec., p. 8). The allegation that the property was to be held in trust by her is also sustained by the allegation in her answer (Rec., p. 9) to the effect that the appellant always told the appellee that she would as long as he lived provide him with a home, and all that was necessary for him. The allegation that the property was held in trust is also supported by the testimony, when upon her direct examination, in answer to questions (Rec., p. 38), she testifies that she made the promise and held out to him in connection with the signing of the deed that she would always take care of him whether he had anything or not (Rec., p. 40); that in consideration of his deeding the property she promised to give him a home in that house as long as he lived, the language used being as follows: "Q. Did you ever agree as a consideration for that deed that you would give him a home in that house as long as he lived? A. I always said I would take care of him as long as I lived or as long as he lived. Q. Did you always do that? A. I always did" (Rec., p. 40).

It is plain from the evidence referred to that the deed in question was never the mutual contract between the parties and that it was mutually intended to be simply a deed for the benefit of the appellee. And it having been conclusively shown that the deed in question is not the contract between the parties it necessarily must be set aside. For while it is conclusively shown it was not their contract, it is impossible for the court to determine from the conflicting evidence what was the mutual contract of the parties. It was also shown conclusively by the evidence that even if the conclusions were as stated by the appellant that she would always give him a home in the house, it is apparent that that consideration has failed, because when he went away

under the conditions which have been testified to, she immediately took possession and put another occupant in the only room which was available for him (Rec., p. 50).

The deed not being the contract of the parties and the consideration, if any, having wholly failed, the only action the court can take is to put the parties back in statu quo by setting aside the deed.

Diggins vs. Doherty, 4 Mackey, 172.

Appellant's Testimony Contradicts Itself.

The testimony of the defendant (appellant), in reference to the making and the executing of the deed is wholly discredited, as appears from the following references to the testimony.

She (the appellant) testifies that Killigan (the appellee) went with her to Archer's office to employ him to draw the deed at the time she paid him (Archer) for drawing the deed (see appellant's testimony, Rec., p. 37). Her testimony in this regard is just the contrary to her allegation in her sworn answer as to how the deed was drawn, where she says (Rec., p. 9). "Shortly before the execution of the deed in controversy, the plaintiff (Killigan, the appellee) sent for Mr. James B. Archer, a member of the bar of this court, to come to see him, the message having been delivered to said Archer by Mr. James Springman, formerly a deputy United States Marshal." Either one or the other or both of these sworn statements which she makes in reference to the making of the deed must necessarily be false. She (appellant) is also contradicted in this regard by the witness, Hufty, the notary public, who testifies (Rec., p. 29), that on March 30, 1909, he was summoned by Mr. Archer to his (Archer's) office to get Killigan's acknowledgment of a deed; that Mrs. Stahl (Sullivan, appellant) was there at Archer's office, and he thinks she had a young child

with her. Killigan (appellee) was not there, because he, Hufty, was told by Mrs. Stahl (Sullivan, appellant) that he, Killigan, would be at his store along about 1 o'clock of that day (March 30, 1909). Hufty also testifies positively that Killigan was not then at Archer's office (Rec., p. 30). He, Hufty, went to the store, but Killigan was not there, and that Mrs. Stahl (Sullivan, appellant) told him, Hufty, that she had *kept* him (Killigan) as long as she could, but she couldn't *hold* him any longer (Rec., p. 29). He, Hufty, asked her (appellant) if *she* (appellant) wanted him, Hufty, to come back again that afternoon (March 30, 1909) to *get* him (Killigan) to sign that afternoon. On March 31 (1909) Hufty testifies he saw appellant again. She (appellant) said Killigan had gone out. She (appellant) said *she* would *keep* him when he (Killigan) got back (Rec., p. 29). It then appears from the other testimony, which has been hereinabove quoted or referred to in this brief (appellee's brief, above) that Hufty finally found Killigan at his home on Seventh Street between 10 and 11 o'clock on the morning of March 31, 1909; that he was asleep on the sofa. Up to this time she (appellant) had directed every step for Killigan to take in reference to the deed, and the last step she took toward directing him, was in consummation of her previous plan to obtain this deed from him. She did not even wait for the notary public to explain to him (Killigan) the object of his visit, but waking Killigan up from a drunken sleep, she explains to him (Killigan), and practically directs him what to do, by saying to him "there was the notary public to witness the deed" (Rec., p. 38). All this time she (appellant) knew that Killigan was at that time drinking to excess, and she admits this in her answer (Rec., p. 7) covering the months of February and March, 1909, and the deed was signed March 31, 1909.

We respectfully submit that the above facts are not

only evidence of undue influence exerted by the appellant on the appellee, but are evidence of actual fraud sufficient to avoid the deed, made by a man who, because of excessive drink at that time, was mentally incapable of making a valid deed.

ARGUMENT OF THE LAW.

Appellant's First Assignment of Errors.

There was and is absolutely no foundation in the record for the appellant's (first) assignment of errors and her additional assignment (No. 2) both relating to the testimony of James B. Archer.

If the appellant desired the witness, Archer, to testify *further* than he did in the case, she was required to present this question to the lower court, and have the lower court pass upon the question, before she can base an assignment of errors upon the question of the witness' refusal to testify further than he did. The question of Mr. Archer testifying further in the case was never presented to the lower court, but the appellant voluntarily went to trial upon the testimony as it was in the record. The record, at page 55, speaks for itself upon this question as follows:

"The question as to the testifying of the witness, Archer, was never again brought to the attention of the court or certified to it."

If the appellant had desired to have this matter of the *further* testifying of the witness, Archer, presented to the court below for decision so as to base an assignment of errors for this court to consider the question, it was necessary for the appellant to follow either one of two courses, namely, either *first* to comply with the proceedings prescribed by rule 78 of the Rules of Practice of Equity, established by the Supreme Court of the United

States; or, *second* to comply with the practice which prevailed in the High Court or Chancery of England at the time of the adoption of the Constitution of the United States.

Sec. 1061, Code, D. C.

2nd Daniell's Ch. Pl. & Pr., 1083.

Alexander's Ch. Practice, 83 citing *Bryson vs. Petty*, 1 Bland's Ch., 182 (Reported in footnote).

Clark vs. Harmer, 9 App., 1.

In the last-cited case, a motion was made to strike out the testimony of a witness, because he had not appeared for further cross-examination, but as stated at page 5 of the report—

“the court denied the motion, for the reason, as stated, that Lynch had in fact been cross-examined, and had been permitted to depart without notice to the court that further examination of him was desired. To this ruling of the court exception was taken on behalf of the plaintiff and the ruling is here assigned as error.”

This court in passing upon that assignment of errors at page 7 say—

“the refusal of the court to strike out the testimony of Lynch was manifestly proper, upon the grounds given for the refusal.”

The proceedings for compelling a witness to testify in equity causes is prescribed both by Rule 78 of the Supreme Court of the United States (by sec. 1061, Code D. C.) and by the practice prevailing in the High Court of Chancery of England at the time of the adoption of the Constitution; and both of the modes of practice in this regard are in force in the equity courts of the District of Columbia.

Fontain *vs.* Ravenel, 17 How., 369, 15 L. Ed., 80, where is it said at page 385, L. Ed., 86, as follows:

“The courts of the United States can not exercise any equity powers, except those conferred by acts of Congress, and those judicial powers which the High Court of Chancery in England, acting under its judicial capacity, as a court of equity, possessed and exercised at the time of the formation of the Constitution of the United States.”

The practice prevailing in the High Court of Chancery of England, is set forth in Daniels Pl. and Pr., at page 1083, and which has been the practice prevailing in the District of Columbia since the year 1801, when the District was ceded to the United States by Maryland.

Alexander's Ch. Pr., p. 73, citing Bryson *vs.* Petty, 1 Bland's Ch., 182.

The question of the further testifying of the witness Archer, never having been presented and passed upon by the lower court, it is not before this Court of Appeals for consideration.

Missouri P. R. Co. *vs.* Fitzgerald, 160 U. S., 556; 40 L. Ed., 536.

Fowler *vs.* Lansing, 164 U. S., 225, 41 L. Ed., 424, at 425.

Chicago I. L. R. Co. *vs.* McGuire, 196 U. S., 132, 49 L. Ed., 413, at 417.

Barrow *vs.* Reab, 9 How., 366, 13 L. Ed., 177.

Morrow *vs.* Jones, 106 U. S., 466, 27 L. Ed., 267.

Rogers *vs.* Ritter, 12 Wallace, 317, 20 L. Ed., 417.

Eaton *vs.* Brown, 20 App. D. C., 453.

But it is respectfully submitted to the court that the real reason why the appellant did not adopt the proceedings required of her below was because the witness,

Archer, had testified to practically every matter that was relevant, pertinent, and proper for him to testify to, notwithstanding the objections of the plaintiff, which objections, however, the plaintiff (appellee) subsequently waived, through his attorney in his (appellee's) presence (Rec., p. 54). The waiver was made by the counsel for the plaintiff, but was done in the presence of the plaintiff himself and for this reason was a waiver by the plaintiff, it appearing from the testimony that the plaintiff was present at every session of the taking of the testimony including the session when the waiver of the objections to Archer's testimony was made by his counsel (Rec., p. 58), where it is testified by the plaintiff, as follows:

"I have been present at all sessions where testimony has been taken, both for the plaintiff and for the defendant."

The appellant having elected to go to trial before the court below upon the testimony as it appears in the record, and not to insist on the witness, Archer, further testifying, it is now too late, the decision being against her, for her to assert that the court below erred in not deciding a question which was never brought before it for decision. It is further respectfully submitted to the court, that the appellant never made an offer to the court below of what she expected to prove by the witness, Archer, in any further testimony he might give, and has not shown that she would be prejudiced by the testimony being omitted.

While we insist that as the further testifying of Archer was not before the lower court, and therefore not before this court on appeal, the following propositions are here inserted merely to answer the propositions raised by appellant.

A denial of the alleged client that he consulted the

attorney does not destroy the privilege as to matters concerning which the attorney states that he was consulted professionally.

Gulf, etc., R. R. Co. *vs.* Gibson, 42 Tex., Civil App., 306, 93 S. W., 469.

This is exactly the case regarding Archer's connection with the transaction. Killigan denied the relationship and Archer claimed that regarding the deed he was employed professionally (Rec., p. 45).

There is no question as to the correctness of the rule laid down in *Hunt vs. Blackburn*, 128 U. S., 464, cited by the appellant in her brief (page 11), but in that case Mrs. Blackburn entered upon a line of defense which involved what transpired between herself and the attorney and hence it was held she had waived the privilege. In the case at bar Killigan in his testimony simply stated that he never directly or indirectly directed the deed to be drawn (Rec., p. 20) and, therefore, did not go into the matter in his testimony in such a way that a waiver could have been implied therefrom. It is, therefore, respectfully submitted that the rule laid down in *Gulf, etc., R. R. Co. vs. Gibson*, *supra*, is the correct rule, where the alleged client denied the relationship and the attorney claimed the professional relationship.

Appellant's Cases on Privilege Not in Point.

The cases cited by the appellant on the point of charges of shameful conduct against the attorney do not apply to this case. The appellee, though confident he was right in his contention regarding the inadmissibility of Archer's testimony, nevertheless waived the privilege by his counsel in his presence by so stating on the record (Rec., p. 54).

To be more than fair we consented to let his testimony in; still the appellant failed to take the necessary steps to get the testimony in, as heretofore shown.

By reason of the many inconsistencies regarding Archer's connection with the transactions, as shown by the answer of the appellant, her testimony, and Archer's testimony, this was a most proper case for appellee to have insisted on the objection. Appellant in her sworn answer says she did not know Archer before the deed transaction; that Killigan sent Springman for Archer and Archer came to the house (Rec., p. 9). In her testimony she admits (Rec., p. 43) that she had employed Archer a year and a half before in her own business matters before she went to see him regarding the deed at the suggestion of Springman; that she took the appellee to Archer's office (directly contradicting her answer, where she said Springman employed Archer for Killigan and Archer called on Killigan); also that she paid Archer (Rec., p. 38). Archer says that he met the appellant through Killigan and that he did not know her until the time of the deed (Rec., p. 52); he then says he never attended to any business for her (Rec., p. 45), afterwards changing that statement (Rec., p. 52); he also says nobody paid him (Rec., p. 46). Archer probably was engaged by Springman, as the appellant first swore in her answer, but after her business relationship with Springman was shown after she had admitted that Springman had sent her to Archer more than a year before, in relation to her own affairs, she then leaves Springman out of the case and her story in evidence is that she and the appellee went to Archer's office. She is the only one who traces Killigan to Archer's office and in doing so directly contradicts the statement in her answer. The notary traces her in Archer's office on the day the deed was drawn and delivered to him and at that time the appellee was not there (Rec., pp. 29 and 30).

It is admitted that the rules laid down on page 15 of appellant's brief relative to an attorney acting for two parties, a mere scrivener of a deed and the notary public

who happens to be a lawyer may testify, are correctly stated for the proper cases, but the rule which governs this case is found directly following these three propositions as laid down in 40 Cyc., 2365, and is stated as follows:

“But where an attorney is employed in his professional capacity, he can not testify as to communications in regard to a deed or other instrument, which he prepared for his client in the course of such employment.”

See note 10, 40 Cyc., 2365, citing cases decided.

Appellant's Second Assignment of Errors.

We respectfully submit that the question of laches is not before this court for consideration or determination. That it was not raised by the appellant's answer, nor was it presented to the court below for consideration or determination. If laches are not relied on in lower court the defense will be considered waived, and can not be urged in the appellate court.

12 Encly. Pl. & Pr., 831, and cases cited.

Unless laches is pleaded it will never be considered by the court without the laches are gross.

Trust Co. *vs.* Darling, 21 App. D. C., 132.

Darlington *vs.* Turner, 24 App. D. C., 573.

It is, however, respectfully submitted that there is no ground for the defense of laches in this case and that the appellant's fraud would preclude the consideration of the question. It is clear from the evidence that as soon as the appellee fully realized that the appellant did not intend to carry out the trust reposed in her by him, he instituted this action against her, as expeditiously as the condition of the case would permit. The cases cited by the appellant are, therefore, not in point, and her

whole defense on the merits is inconsistent with the defense of laches.

Appellant's Third, Fourth, and Fifth Assignment of Errors.

The appellant's assignment of errors, three, four, and five, go to the merits of the appellee's case. From the evidence set forth in this brief, we contend that as a matter of law and equity, the deed should be set aside, and respectfully submit the following cases in support of all of the material allegations of the bill, which we confidently contend have been conclusively proven by the evidence.

"Whenever there is great weakness of mind arising from age, sickness, or any other cause, in a person executing a conveyance of land, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs interfere and set the conveyance aside" (Syllabus).

Allore vs. Jewell, 94 U. S., 506; 24 Law Edition, 260.

Griffith vs. Godey, 113 U. S., 89, 95; 28 Law Edition, 934, to the same effect.

Where a sick man has conveyed all of his property, leaving himself to be clothed and fed at the pleasure of his grantee, the weakness of mind, with the other circumstances, make up that amount of imposition and fraud which will avoid a deed.

Brogden vs. Walker, 2 H. & J. (Md.), 283.

Gibson vs. Jeyer, 6 Ves., 275.

The case of *Brogden vs. Walker*, we respectfully submit, is directly in point. So much of said decision as bears directly upon the issues of this case is as follows:

Page 292 of original 2 H. & J. and page 255 of 6 Brantley's ed.:

"As to the other point, the chancellor conceives, as on other occasions he has declared, that fraud is not to be considered as a single fact, but a conclusion to be drawn from all the circumstances in the case. It is certain, that although the defendant has generally denied fraud, he has denied but few of the matters charged in the bill.

"But the chancellor does not consider himself under the disagreeable necessity of deciding whether or not there was fraud in obtaining the deeds. He views the deeds as executed by a weak young man, conscious of his inability to protect his property, or to manage his own concerns, and therefore resolving to place himself under the guidance and protection of an able and affectionate relation. If it could be imagined that he meant to convey every part of his ample property for the benefit of that kinsman only, and to be absolutely dependent on him for subsistence, he must be deemed very little superior to an idiot. Were he alive, and in the place of the present complainants, who is there that would not declare it the duty of this tribunal to save him from the wretched consequences of an act proceeding from madness, folly, or habitual ebriety, etc.

"Supposing the intent of the deeds to have been that Walker should retain his own property during his life, and afterwards his uncle should have an absolute fee, how different would the deeds, properly prepared for that purpose, have been from the deeds executed by Walker. How different, too, the chancellor must say, would have been the circumstances attending the execution and acknowledgment. The best and fairest construction is, that the deeds were intended to secure to Brogden a debt, which although greater than Walker might have admitted, was trifling in comparison to the value of the property conveyed, and to put it out of the power of the

grantor to squander his estate, and become a prey to designing men. Here then was a resulting trust, or here was an equity of redemption, or here was a silly, intemperate young man, who really did not know what he was about, and who therefore ought to have the protection of a tribunal, whose peculiar duty it is to watch over idiots, lunatics, madmen, and fools."

"It has been urged on the part of the defendant that the complainants (who were devisees of Walker) are not creditors; that is to say, it is supposed, that not having paid a valuable consideration for Walker's property, they have no claim which ought to be regarded by this court against the legal title vested in Brogden by the deeds. No! If Walker, during his life, was entitled to relief, his representatives, on every sound principle, are also entitled. When has it ever been decided, by this or any tribunal, that relief, which might have been obtained by a complainant who has died shall not be granted to his representatives, reviving the suit? Or, even that a representative instituting an original suit shall not have the same relief which would have been granted to his ancestor, deviser, testator, etc.

"The chancellor repeats that the decree he is about to make is not grounded upon a conviction that fraud was perpetrated by the defendant. He is clearly of opinion that the complainants are entitled to a decree in their favor on other substantial grounds." Decree setting aside deed.

"A court of equity has jurisdiction of a suit brought by heirs at law to set aside a conveyance of lands obtained from the ancestor by undue influence, he being so infirm in body and mind from old age, and other circumstances, as it will be liable to imposition, although his weakness does not amount to infirmity."

Harding vs. Handy, 11 Wheat., 103, 6 Law edition, 429.

See, also—

Conley vs. Nailor, 118 U. S., 127, 133, 30 Law edition, 112.

“In equity the contracts of an intoxicated person are avoided on the ground of fraud.”

Mansfield vs. Watson, 2 Iowa, 111.

Bowen vs. Clark, 3 Fed. Cases, No. 1721; 1 Biss., 128.

Butler vs. Mulvihill, 1 Bligh., 137; 4 Eng. Re-Print, 49.

“Where the contract was manifestly an unfair one, and the person who asked the help of the court of equity was weak from drink or old age, or both, it will be set aside by a court of equity.”

Hume vs. Cook, 16 Grant Ch. (U. C.), 84.

McGregor vs. Bolton, 12 Grant Ch. (U. C.), 288.

Clarkson vs. Kitson, 4 Grant Ch. (U. C.), 244.

Where a deed was set aside for a failure to perform services constituting the consideration, see—

Peroni vs. Corrigan, 47 N. J. Eq., 135; 20 Atl., 218.

Where there is inequality in the condition of the parties a deed will be set aside for inadequacy of consideration.

George vs. Richardson, Gilm. (Va.), 320

Also the following District of Columbia cases:

Howlett vs. Eagan, decided by the court in general term, but not reported.

Diggins vs. Doherty, 4 Mackey, 172.

Barnes vs. Barnes, 20 D. C., 479.

Murray vs. Hilton, 8 App. D. C., 281.

Paroni *vs.* Corrigan, 20 Atl., 218 (Court of Chancery of New Jersey, July 12, 1890):

(Syllabus.)

1. "If a conveyance of land be made for a consideration in services afterwards to be performed by the grantee, and the grantee fails to perform, the conveyance will be set aside at the instance of the grantor."

2. "When confidential relations exist between two persons resulting in one having influence over the other, and a business transaction takes place between them resulting in a benefit to the person holding the position of influence, the law presumed everything against the transaction, and casts upon the person benefited the burden of proving that the confidential relations had been as to the transaction in question, suspended, and that it was fairly conducted, as if between strangers."

Page 227, Atl. Rep., by the court, Pitney, V. C.:

"The precise difficulty which confronts the defendant is this: He declares that the transaction was started as one of pure gift, and was afterwards changed into one of partial consideration, and he does not show that either as a pure gift or as founded on a partial consideration it was fully understood by the complainant, or to the extent it would presumably have been understood by her, if she had had the benefit of such independent advice as I have indicated; while on the contrary, as I have shown, it did not, as a matter of fact, originate as a pure gift, but was based on a consideration which she greatly prized, and which has wholly failed; and the defendant has not, in my judgment, fully overcome the burden cast upon him by law, under the circumstances, of proving that he actually paid

the partial consideration. The result is that the conveyance in question must be set aside, and a reconveyance decreed. The complainant is entitled to costs."

In answer to that part of the appellant's brief, near its close (at page 29), that there is not the slightest foundation for the allegation in the bill that the appellant committed fraud upon the appellee, it is respectfully submitted that fraud is not to be considered as a single fact, but a conclusion to be drawn from all the circumstances in the case. If, as we contend, the appellee has proven that he, owing to excessive drinking at the time of signing the deed, was not capable of making a valid deed or contract, but that he was under the influence of liquor at the time, it is submitted that fraud was practiced upon him.

In her sworn answer (Rec., p. 9) she states that the deed was made because the appellee wished to protect himself and because he further stated that he knew that the appellant would always give him a home in said house with her and all he needed. This is the position she takes regarding the transaction in her testimony (Rec., p. 40). Therefore the appellant can not now be heard to say that the deed was an absolute gift to her, for she does not so contend.

Supposing, therefore, for the sake of argument only, that as appellant contends in her sworn answer and in her testimony that the intent of the deed was that the appellee was making the conveyance for his protection during his lifetime, and because he knew the appellant would always give him a home in that house with her and all he needed, how different would such a deed, properly prepared for that purpose have been from the deed signed by the appellee. This is the best construction that is placed upon the deed by the appellant herself and following the rule laid down in the case of Brogden

vs. Walker, supra, it is respectfully submitted that the court below did not err in setting aside the deed.

If such was the case, as is contended by the appellant, there was a trust created, though the deed appeared to be absolute on its face, which trust, by reason of its being too indefinite, is not the subject of proper enforcement, and "the proper relief in that case is the rescission of the contract itself."

Diggins vs. Doherty, 4 Mackey, 172 at 177 (*supra*).

To the same effect—

Barnes vs. Barnes, 20 D. C., 479.

For all the reasons hereinabove stated, it is respectfully submitted that the court below did not err in passing its decree setting aside said deed, and that the appellant's assignment of errors are not well taken, and that the decree below should be affirmed, with costs to the appellee.

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